

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
May 1, 2012

v

JAMES THOMAS WRIGHT, JR.,
Defendant-Appellee.

No. 297192
Wayne Circuit Court
LC No. 09-027497-FH

ON REMAND

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

This appeal was previously dismissed as moot because we concluded that the prosecutor had moved to dismiss the case after the trial court granted defendant's motion to suppress the evidence. *People v Wright*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2011 (Docket No. 297192). However, our Supreme Court granted the prosecution's application for leave to appeal and held that the case was not dismissed at the request of the prosecution, but was dismissed "on motion of the court." The matter has been remanded to us for consideration of the issues raised by the prosecution but not addressed in our initial review. *People v Wright*, 490 Mich 868; 802 NW2d 613 (2011). After consideration of those issues, we reverse and remand for further proceedings.

After police executed a search warrant at defendant's home, he was charged with two counts of possession with intent to deliver 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), possession with intent to deliver ecstasy, MCL 333.7401(2)(b)(i), possession of ecstasy, MCL 333.7403(2)(b)(i), felon in possession of a firearm, MCL 750.224f, manufacture of marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. Probable cause supporting the issuance of the search warrant was set forth in a sworn affidavit based primarily on information provided to police by a confidential informant, i.e., hearsay. Subsequently, defendant moved to quash the search warrant and suppress the evidence, arguing that the affidavit was insufficient because it was based on hearsay and the information was not corroborated by police through controlled drug buys, surveillance, or successful trash pulls. The prosecution opposed the motion, arguing that the affidavit established probable cause to issue the search warrant.

The trial court agreed with defendant, holding that the affidavit failed to establish probable cause for the search. It appears that the trial court concluded that the confidential informant was credible and the information he supplied was reliable but, because the police did not independently observe criminal activity, or actions that might imply or verify criminal activity, the warrant “was not supported by a constitutionally sound affidavit.” The court held that the magistrate acted unreasonably “in executing a warrant without there being any showing of independently observed criminal activity on the part of the affiant, and that is a constitutional problem, not a statutory problem.” And because of the constitutional nature of the violation, the court concluded that the good-faith exception to the exclusionary rule did not apply. Accordingly, defendant’s motion to suppress the evidence obtained pursuant to the search warrant was granted.

On appeal, the prosecution argues that the trial court erred in concluding that incriminating information provided by a credible confidential informant had to be corroborated by police to establish probable cause in support of the issuance of a search warrant. We agree.

A trial court’s factual findings on a motion to suppress seized evidence are reviewed for clear error, but questions of law and its ultimate decision are reviewed de novo.¹ A magistrate’s determination of probable cause, however, is not reviewed de novo but “should be paid great deference by reviewing courts.”² “Affording deference to the magistrate’s decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate’s conclusion that there is a ‘fair probability that contraband or evidence of a crime will be found in a particular place.’”³

A search warrant may not issue unless probable cause exists to justify the search. US Const, Am IV; Const 1963, art 1, §11; MCL 780.651(1). “Probable cause to issue a search warrant exists where there is a ‘substantial basis’ for inferring a ‘fair probability’ that contraband or evidence of a crime will be found in a particular place.”⁴ Generally, a claim that probable cause exists is set forth in a sworn affidavit by a law enforcement officer seeking the warrant.⁵ The affidavit must contain facts detailing the underlying circumstances which lead the affiant to believe that probable cause exists and can be founded on hearsay.⁶ That is, the affidavit

¹ *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003); *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008).

² *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007) (citations omitted).

³ *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000), quoting *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

⁴ *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000), quoting *Russo*, 439 Mich at 604.

⁵ *People v Sherbine*, 421 Mich 502, 507; 364 NW2d 658 (1984), overruled in part on other grounds by *Hawkins*, 468 Mich at 502.

⁶ *United States v Ventresca*, 380 US 102, 108-109; 85 S Ct 741; 13 L Ed 2d 684 (1965); *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991).

establishing probable cause may be based on the personal observations of another person who supplied the information to the affiant “so long as a substantial basis for crediting the hearsay is presented.”⁷

“[A] substantial basis for crediting the hearsay” was essentially defined by the United States Supreme Court in *Aguilar v State of Texas*, 378 US 108; 84 S Ct 1509; 12 L Ed 2d 723 (1964), as requiring considerations of (1) the basis of the informant’s knowledge of criminal activity and (2) the reason that the affiant relied on that information, i.e., either the informant was credible or the information supplied was reliable. *Id.* at 114.⁸ However, in *Illinois v Gates*, 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983), the United States Supreme Court held that a rigid application of such a “two-pronged test” was not required to establish a substantial basis for crediting hearsay. *Id.* at 231 n 6, 238. Rather, probable cause determinations should be based on a “totality-of-the-circumstances analysis” where

[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. [*Id.* at 238.]

A reviewing court must only determine whether the magistrate had a substantial basis for concluding that probable cause existed. *Id.* at 238-239.⁹ The *Gates* Court referred to *Jones v United States*, 362 US 257; 80 S Ct 725; 4 L Ed 2d 697 (1960), as setting forth such a “totality-of-the-circumstances” analysis “that traditionally has informed probable cause determinations.” *Gates*, 462 US at 238.

In *Jones*, an affidavit in support of a search warrant was challenged as insufficient because it rested wholly on hearsay; the affiant did not personally observe the alleged illegal activity. *Jones*, 362 US at 257. In particular, the affiant averred that an unnamed informant told him that the defendant was involved in narcotics trafficking and kept heroin in his apartment for that purpose. *Id.* at 268. The informant also claimed to have purchased narcotics from the defendant at the apartment. *Id.* The affiant further indicated that the informant had given him information “on previous occasion” which was correct and that other sources had also provided the same information about the defendant. *Id.* at 268-269. And, the affiant averred, the defendant was an admitted user of narcotics. *Id.* at 269.

The *Jones* Court held that the affidavit established probable cause because there was a “substantial basis for crediting the hearsay.” *Id.* at 267-268. The *Jones* Court noted that if the

⁷ *Jones v United States*, 362 US 257, 269; 80 S Ct 725; 4 L Ed 2d 697 (1960), overruled in part on other grounds by *US v Salvucci*, 448 US 83, 85; 100 S Ct 2547; 65 L Ed 2d 619 (1980).

⁸ *Aguilar*, 378 US at 108, was subsequently explained and refined by *Spinelli v United States*, 393 US 410; 89 S Ct 584; 21 L Ed 2d 637 (1969). See *People v Levine*, 461 Mich 172, 179; 600 NW2d 622 (1999).

⁹ See, also, *Hawkins*, 468 Mich at 502 n 11.

affiant had merely been told that the defendant was selling narcotics in his apartment, such information may not have been enough to support the warrant. *Id.* at 271. However, the affiant also “swore to a basis for accepting the informant’s story.” *Id.* The affiant specifically averred that (1) the informant had previously given accurate information, (2) the informant’s story was corroborated by other sources of information, and (3) the defendant was known by the police to be a user of narcotics. *Id.* And the *Jones* Court rejected the defendant’s argument that the warrant was defective because the affiant did not “swear to the results of his own independent investigation of the claims made by his informants.” *Id.* The Court noted that the defendant had not alleged that the affiant made misrepresentations in his affidavit; thus, the only issue was whether the representations were sufficient to establish probable cause to issue the warrant. *Id.* at 271-272. The *Jones* Court continued that, because “hearsay alone does not render an affidavit insufficient,” the affiant was not required to “have personally made inquiries about the apartment, so long as there was a substantial basis for crediting the hearsay.” *Id.* at 272.

In Michigan, an affidavit in support of a search warrant must not only meet constitutional standards of validity, but also statutory requirements related to content.¹⁰ In particular, MCL 780.653(b) applies to determinations of probable cause when the affidavit is based on information supplied to the affiant by an unnamed person. This statute derives from the defunct “two-pronged test” set forth in *Aguilar*,¹¹ and provides that the affidavit must contain

affirmative allegations from which the magistrate may conclude that the [unnamed] person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable. [MCL 780.653(b).]

Personal knowledge may be inferred from the facts and information specifically set forth in the affidavit, such as the manner in which the information was gathered or by sufficiently detailed information about the purported criminal activity. The magistrate must be able to discern that the informant acquired his information in a reliable way and did not rely on casual rumor or accusations based on reputation.¹² Credibility can be established by disclosure that the informant provided information in the past which later proved to be correct.¹³ When information is provided to police by an anonymous tip—so that credibility cannot be ascertained—the police may sufficiently corroborate the information by independent sources to determine that the information is reliable.¹⁴ As explained in *Gates*, 462 US at 227, police corroboration of an anonymous tip is necessary because such a tip does not provide sufficient information from

¹⁰ See *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007); *Sherbine*, 421 Mich at 507.

¹¹ See *Hawkins*, 468 Mich at 501.

¹² *People v Walker*, 401 Mich 572, 580-581; 259 NW2d 1 (1977); *People v Bobby Martin*, 271 Mich App 280, 302-303; 721 NW2d 815 (2006); *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992).

¹³ *Walker*, 401 Mich at 582-583.

¹⁴ *Levine*, 461 Mich at 184, citing *Walker*, 401 Mich at 583.

which to conclude that (1) the tipster had personal knowledge of criminal activity, (2) the tipster was honest, or (3) the information was reliable.

The affidavit at issue here provided, in its first twelve paragraphs, the affiant's extensive experience and training as a police officer, including as an investigator of narcotics cases. The following information was also included:

1. Within the past two weeks of the presentation of this affidavit, the affiant was contacted by Westland Police Informant PL-1053, who informed the affiant that they knew of a black male, whom they know as "Muscle", who lives at 4432 Walnut with his mother, and who sells cocaine and crack cocaine from the location and from his dark blue Mercury Marquis. According to Westland Police Informant PL-1053, they have been at the location in the past, with "Muscle" and "Muscle" has shown them cocaine that he sells from the location. According to the informant, "Muscle" is approximately 40 years old, and is six feet tall and has a medium build. Westland Police Informant PL-1053 has provided information to Westland Police Special Investigations Unit at least eight times in the past and that information has enabled the Westland Police to seize controlled substances from persons who traffic controlled substances, and persons who traffic controlled substances. The informant told the affiant that "Muscle" has guns in his house for the protection of his illegal cocaine business. The affiant ran all persons registered to 4432 Walnut, Inkster, MI, which revealed a James Thomas Wright Jr B/M 06/04/1967. The affiant obtained a Michigan driver's license for James Thomas Wright Jr B/M 06/04/1967 via lien and showed it to the informant, who told the affiant that the guy in the picture is the guy who he knows as "Muscle." According to the Michigan Secretary of State, James Thomas Wright Jr B/M 06/04/1967 is described as being six feet tall and weighing 200 pounds.
2. Officer Lange drove by 4432 Walnut and observed a dark colored Mercury Marquis with Michigan license plate #7JEL20. The affiant conducted a lien check of Michigan license plate #7JEL20 which registered to 1985 Mercury Marquis and to a James Thomas Wright Jr at 4432 Walnut, Inkster, MI.
3. The affiant conducted a criminal history check of James Thomas Wright Jr B/M 06/04/1967, which revealed that he was found guilty of deliver/manufacture a controlled substance less than 50 grams and felony firearms on 1/10/90 (Detroit Recorder's Court) and then found guilty of felony firearms on 11/13/02 (3rd Circuit Court).
4. Within the past forty eight hours, Westland Police Informant PL-1053 told the affiant that they talked with James Thomas Wright Jr B/M 06/04/1967 AKA "Muscle" and that Muscle told them to come to 4432 Walnut, Inkster, MI to buy some cocaine. The informant told the affiant the exact date and time that this phone call took place and the affiant confirmed that this took place within the past forty eight hours.

5. It is the affiant's experience that persons who traffic controlled substances often keep firearms for the protection of their illegal business.

6. It is the affiant's belief that a search of the location, person, and vehicle will yield both controlled substances and the proceeds from selling controlled substances.

We conclude that the affidavit provided a substantial basis for a magistrate to find that there existed probable cause to believe that controlled substances, firearms, and evidence of drug trafficking would be found on defendant, at his residence, and in his vehicle as set forth in the search warrant.

As in *Jones*, 362 US at 268, the affiant averred that an unnamed confidential informant told him that defendant—who was named and physically described—sells cocaine and crack cocaine from his residence and from his vehicle, which were also both specifically identified. The confidential informant told the affiant that he had been at defendant's house and that defendant had shown him cocaine that he sells. And the informant had a telephone conversation with defendant at which time defendant told the informant to come to his residence to buy cocaine. The informant also knew that defendant kept guns in his house for protection of his illegal cocaine business. The affiant confirmed, through other investigative sources, that: (1) defendant fit the physical description provided by the informant and the informant identified defendant by photograph, (2) defendant lived at the identified residence, (3) the specifically identified vehicle was at that residence and was registered to defendant, and (4) the claimed telephone call on a certain date and time between the informant and defendant actually took place. Thus, it is clear that the confidential informant “spoke with personal knowledge of the information,” MCL 780.653(b), and the magistrate was able to discern that the informant acquired his information in a reliable way.¹⁵

Further, the affiant “swore to a basis for accepting the informant's story.”¹⁶ The affiant averred that the confidential informant had provided information to police at least eight times in the past which enabled police to seize controlled substances from persons who traffic controlled substances. And the affiant also averred that defendant had a criminal history which included convictions for delivery/manufacture of controlled substances, as well as felony firearm.¹⁷ Thus, the affiant had reason to believe that the confidential informant was credible and the magistrate could conclude that the informant was credible. Because the information was provided to police by a confidential informant and not by an anonymous tipster, the affiant was not required to corroborate the incriminating information through controlled drug buys, surveillance, or trash pulls to establish probable cause to support the issuance of a search warrant.¹⁸ That is, because

¹⁵ See *Walker*, 401 Mich at 580-581.

¹⁶ See *Jones*, 362 US at 271.

¹⁷ See *id.*

¹⁸ See *Gates*, 462 US at 227-228; *Jones*, 362 US at 271-272; *Levine*, 461 Mich at 184.

the informant spoke with personal knowledge and was credible, MCL 780.653(b), it was not necessary for the affiant to also establish that the information was reliable.¹⁹

Accordingly, the affidavit in support of the search warrant was constitutionally valid, i.e., established probable cause, and MCL 780.653(b) was not violated. The magistrate made a practical and common-sense decision that, given all of the circumstances as set forth in the affidavit, including the confidential informant's basis of knowledge and his credibility, there was a fair probability that contraband or evidence of narcotics trafficking would be found on defendant, in his residence, and in his vehicle.²⁰ There was a substantial basis for this conclusion. And the contents of the affidavit satisfied the requirements of MCL 780.653(b); the confidential informant spoke with personal knowledge of the information and was credible. Therefore, we reverse the trial court's order granting defendant's motion to quash the search warrant and suppress the evidence. The trial court's conclusion that the warrant "was not supported by a constitutionally sound affidavit" was erroneous. In light of our resolution of this issue, we need not address the prosecution's alternative argument that the good-faith exception to the exclusionary ruled applied under the circumstances of this case.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Michael J. Talbot

/s/ Cynthia Diane Stephens

¹⁹ See *Keller*, 479 Mich at 482.

²⁰ See *Gates*, 462 US at 238-239; *Kazmierczak*, 461 Mich at 417-418.