

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL BENBOW,

Defendant-Appellee.

UNPUBLISHED

September 14, 2004

No. 247255

Wayne Circuit Court

LC No. 03-000640

Before: Donofrio, P.J. and White and Talbot, JJ.

PER CURIAM.

The prosecutor appeals as of right from a circuit court order granting defendant's motion to suppress evidence and dismissing the case. We reverse and remand.

Defendant was charged with possession of less than fifty grams of heroin with intent to deliver, MCL 333.7401(2)(a)(iv), after the police executed a search warrant at what is presumably his house. Defendant filed a motion to suppress, claiming that the magistrate erred in issuing the warrant because the supporting affidavit did not establish that drugs were in the house. The trial court agreed and dismissed the charge.

The trial court's ruling on a motion to suppress is reviewed de novo on appeal. *People v Echavarría*, 233 Mich App 356, 366; 592 NW2d 737 (1999). In reviewing a motion to suppress evidence, this Court reviews the trial court's factual findings for clear error but reviews its ultimate decision de novo. *Id.* When reviewing a magistrate's conclusion that probable cause to search existed, this Court does not review the matter de novo or apply an abuse of discretion standard. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). Paying deference to the magistrate's determination that probable cause did exist, this Court considers only whether the actual facts and circumstances presented to the magistrate would permit a reasonably cautious person to conclude that there was a substantial basis for the finding of probable cause. *People v Sloan*, 450 Mich 160, 168-169; 538 NW2d 380 (1995), reh den 450 Mich 1212 (1995), overruled in part on other grounds by *People v Hawkins*, 468 Mich 488, 502, 511; 668 NW2d 602 (2003), and by *People v Wager*, 460 Mich 118, 123-124; 594 NW2d 487 (1999).

Issuance of a search warrant must be based upon probable cause. 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." *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). "A magistrate can consider

only the information in the affidavit made before him in determining whether probable cause exists to issue a search warrant.” *People v Sundling*, 153 Mich App 277, 285-286; 395 NW2d 308 (1986). The search warrant and underlying affidavit are to be read in a commonsense and realistic manner. *Russo, supra* at 604.

The officer stated in the supporting affidavit that he observed a named woman buy suspected narcotics from the “seller” described in the warrant at the house. He stopped her and confiscated the suspected narcotics, which tested positive for heroin. He later conducted additional surveillance of the house and observed five persons make brief visits to the house that, in his experience, were consistent with the sales of narcotics. An officer’s experience is relevant to the establishment of probable cause, *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001), and an officer’s observation of drug trafficking activity during surveillance is sufficient to support a search warrant. *People v Mario Perry*, 463 Mich 927; 620 NW2d 308 (2000); *People v Griffin*, 235 Mich App 27, 42-43; 597 NW2d 176 (1999). Although the affidavit did not conclusively establish that the seller obtained the drugs from inside the house, “the affidavit need not *prove* anything.” It only has to provide a substantial basis for concluding that there is a fair probability that contraband or evidence of a crime will be found in the place stated. *People v Whitfield*, 461 Mich 441, 445-446; 607 NW2d 61 (2000) (emphasis in original). The affidavit met that requirement and the trial court erred in concluding otherwise.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Pat M. Donofrio
/s/ Helene N. White
/s/ Michael J. Talbot