STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOEL WILSON,

Defendant-Appellee.

UNPUBLISHED
April 22, 2021

No. 352930
Wayne Circuit Court
LC No. 19-007149-01-FH

Before: GLEICHER, P.J., and BORRELLO and SWARTZLE, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's order suppressing evidence and dismissing without prejudice the charges against defendant, which involved drug and firearm related charges. For the reasons set forth in this opinion, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This appeal stems from defendant's motion to suppress a search warrant. Defendant alleged the search warrant, which authorized a search of defendant's person, a vehicle allegedly registered to defendant, and a house alleged to be a location from which defendant was selling drugs, was overly broad and did not contain sufficient evidence, which if believed, would constitute probable cause. The search warrant was obtained on the basis of an affidavit completed by Westland police officer James Compton. The affidavit in support of the search warrant contained over four pages detailing Compton's experience and training related to investigating various drug and weapons offenses, the methods of operation used by drug traffickers with which Compton was familiar through his training and experience, and the process of searching and seizing information from computers. The section of the affidavit titled "Statement of Probable Cause" contained the following paragraphs that are most directly pertinent to the issue on appeal:

> 5. Your affiant spoke with a known subject who advised your affiant that a subject they know as "Jay" has been selling crack cocaine and heroin in the Westland area and out of their residence . . . in the City of Inkster. The subject provided a phone number of [XXX-XXX-XXXX] for "Jay" and advised your

affiant that they contact "Jay" at this number to arrange for narcotic sales. The subject further advised that "Jay" drives a tan GMC Yukon.

6. Using police databases, your affiant was able to locate [defendant] and obtained a current photo of [defendant]. Your affiant further found that [defendant] has a 2009 GMC Yukon registered to him . . . . Your affiant then showed the photo to the known subject who advised your affiant that the person in the photo was the subject they know as "Jay" who sells crack cocaine and heroin. At this time, your affiant assigned the subject with Confidential Informant (CI) Number PD-1695.

7. Within the last 48 hours, your affiant met with PD-1695 and had them contact the **"TARGET"** at [XXX-XXX-XXXX] to arrange for the purchase of crack cocaine and heroin. The **"TARGET"** agreed to sell PD-1695 an amount of crack cocaine and heroin and directed them to the **"TARGET LOCATION."** Officer Richardson and Officer Neville then descended upon the **"TARGET LOCATION"** to conducted surveillance and observed the above described GMC Yukon registered to the **"TARGET"** parked in the driveway of the **"TARGET LOCATION."** Your affiant then retrieved an amount of WLPD prerecorded buy funds and conducted a search of PD-1695 and their vehicle for narcotics, money, or weapons. The search was negative. Your affiant then gave the prerecorded buy funds to PD-1695 to make the purchase of crack cocaine and heroin. PD-1695 then drove directly to the **"TARGET LOCATION"** without making any stops between under continued surveillance. PD-1695 arrived at the **"TARGET LOCATION"** and exited their vehicle and entered the **"TARGET LOCATION."** After a brief period of time, PD-1695 exited the **"TARGET LOCATION"** and reentered their vehicle. PD-1695 then left the **"TARGET LOCATION"** and drove directly to a predetermined meet location without making any stops under continued surveillance. Your affiant then met with PD-1695 who produced a knotted baggie of crack cocaine and a knotted baggie of heroin. PD-1695 advised your affiant that they purchased the crack cocaine and heroin from the **"TARGET."** Your affiant again searched PD-1695 and their vehicle for any narcotics, money, or weapons. The search was negative.

8. Your affiant then conveyed the crack cocaine and heroin back to WLPD where your affiant conducted a preliminary analysis on them with the crack cocaine testing positive for it's respective drugs and the heroin testing positive for fentanyl. I then sealed both drugs into evidence to be sent to MSP for final analysis.

Compton's affidavit in support of the search warrant also stated, "This affidavit is made for the sole purpose of demonstrating probable cause for the requested warrants and does not purport to set forth all of my knowledge of or investigation into this matter."

The trial court held an evidentiary hearing on defendant's motion to suppress. At the hearing, Compton testified that he conducted two "controlled buys" at the residence using a confidential informant before obtaining the search warrant. One controlled buy was conducted on November 5, 2018, and one was conducted on March 18, 2019. The March controlled transaction occurred within 48 hours before Compton sought the search warrant on March 19, 2019. Compton

testified that the November 2018 transaction was not included in the search warrant affidavit because the information from that particular incident was "stale" by the time he sought the search warrant in March 2019. Compton also indicated that he did not rely on the information from the November transaction to obtain the search warrant. However, Compton also testified that the confidential informant identified defendant when Compton met with the confidential informant a few days before the November controlled transaction and that the information regarding defendant that Compton obtained from this meeting with the confidential informant was included in the search warrant affidavit. Compton did not include the date of this meeting in the search warrant affidavit in order to "protect the identity" of his informant. Compton confirmed that Paragraphs 5 and 6 of the search warrant affidavit contained information that he had obtained before November 5, 2018.

Compton testified that he conducted additional surveillance of the residence by driving by it on "a couple of occasions" to verify that the target vehicle was still at the residence. This surveillance was not documented, and Compton did not recall the exact dates on which this surveillance occurred. Compton also did not include this surveillance in the search warrant affidavit. Compton acknowledged that the affidavit contained information that he gathered in November 2018, that the affidavit did not provide dates, and that the only time frame included in the affidavit was the reference to the 48 hours preceding March 19, 2019. Compton testified that the reference to the previous 48 hours only related to the occurrence of the second controlled transaction. Compton also testified that he met with the confidential informant before the second controlled transaction was conducted in March 2019 and confirmed that the information he had previously obtained was "still up-to-date and accurate." Compton emphasized during his testimony that he verified the information in the affidavit again before he sought the search warrant and confirmed that all of the information in the affidavit was still true.

Another Westland police officer, Kristopher Richardson, testified at the hearing that he personally observed both the November 5, 2018, and March 18, 2019 transactions at the residence involving the confidential informant and defendant. On each occasion, Richardson was conducting surveillance of the residence as the transaction occurred. Richardson testified that on November 5, 2018, defendant came out of the house and got into the confidential informant's car in the driveway, defendant remained in the car for a short time, and defendant then got out of the car and returned to the house. Richardson testified that on March 18, 2019, he saw the confidential informant arrive at the house, get out of the car and go into the house, and then return to the car after having spent a brief period of time inside the house.

With respect to the March 18, 2019 transaction,[1] Compton testified about the procedure as follows:

> I met with my informant. Had the informant place a call to the target. I arrange for the purpose of the narcotics. Once the arrangement was set I conducted a search of

[1] Although there was some initial confusion about this date during Compton's testimony, he did eventually clarify after refreshing his memory by looking at his report that the testimony that we have quoted in this opinion related to the controlled transaction on March 18, 2019.

my informant for any contraband as well as the informant' s vehicle, which was negative.

I obtained the prerecorded buy funds. I gave those buy funds to the informant. Instructed the informant to purchase the narcotics from the target with those buy funds. I followed the informant to the target location just as before. Where officers Neville and Richardson had already been set up on surveillance.

They were picked up surveillance of my informant as I broke off. The informant made the narcotics purchase. Left the location. And was followed out by Officer Neville until I picked back up. And then met with the informant again.

Compton also testified about meeting with the confidential informant immediately after the transaction:

I met with the informant at a predetermined location. The informant turned over crack cocaine and fentanyl to me. Advised me that they had purchased the narcotics critics [sic] the target. And I took those narcotics back to the Westside Police station where a field test was done on them.

The trial court granted defendant's motion to suppress and dismissed the charges without prejudice. The trial court explained the basis for its ruling as follows:

We conducted an evidentiary hearing. And the Court having heard the testimony and read the pleadings in this matter, the Court, in reviewing the affidavit and the search warrant the first—the Court will note that the first four paragraphs of the affidavit in support of the search warrant, which is about four pages has absolutely nothing to do with surveillance of the defendant's house.

It has absolutely nothing to do with what the CI has done regarding this case. It has nothing to do with the CI's reliability. It is a lot of words that talk about the generalizations of what normally goes on in drug cases. And it talks in great detail about the affiant's experience and training.

And not until you get to paragraph 5, understatement [sic] of probable cause, do you see any information regarding the incidence [sic] of this case. The CI, the confidential buy or anything relating to probable cause.

And paragraph 5. The information contained is--the Court finds that it is a false misleading statement. That the, and deliberately designed so that the magistrate can rely on that. And assume that the information was relating to something that occurred close in time to the time the search warrant was being presented to her.

But in fact, based on the testimony that paragraph 5, contained information of incidents that occurred on—

* * *[2]

. . . And the Court finds that based on the testimony that the information was a summarization of things that happened in November. On November 5th of 2018.

It was maybe allegedly information that was obtained from the CIA [sic] within 48 hours or more or less of this search warrant being signed. Because it was a summary. And it's not specifically stated so that a magistrate can make an informed determination of the probable cause.

Now, there's nothing in here that describes or talks about a continued surveillance even following either of the buys by the CI. But specifically nothing describing a continued surveillance of the buy that allegedly occurred in 2019. And that is important. That it allegedly occurred on March 18, 2019.

And so therefore having to read 4 or 5 pages of just generalizations of what occurs in a buy based on information and experience. And then you get to two paragraphs that deals with probable cause is designed to be, is to convolute what has gone on. And is to deceive and present an appearance of something that actually did not occur. And so the probable cause does not exist there.

There's no, there's nothing in here that indicates that there is a continued surveillance of the activity. Not even, not at all. No sort of continuing illegal activity that's stated in the affidavit. No continue surveillance. And the Court finds that it was an intentional statement of facts or summarization to allow want to make conclusions, but is based on false information.

And so because of that false information the magistrate erroneously signed the affidavit. And even if you look at paragraph 7, that says within the last 48 hours your affiant met with the CI and--I'm sorry. That even if you look at paragraph 5, that the officer testified to, that he had confirmed that the SUV was still in the driveway does not constitute continued surveillance of illegal activity.

So the Court finds, the Court grants the defendant's motion to suppress based on the lack of probable cause in the search warrant.

The prosecutor sought clarification of the trial court's ruling:

[*Prosecutor*]: Just a couple of points for clarification. So the Court's finding that there's insufficient probable cause in the search warrant?

[2] The omitted material only pertains to an interruption to the court proceedings caused by some type of alarm and that is not relevant to the issue on appeal. We have not omitted any substantive portion of the trial court's ruling.

The Court: Yes. And I'm suppressing.

[*Prosecutor*]: And the Court said that the wording created a false impression of something that did not occur. I just need some clarification. What is the Court finding that was specifically false in the affidavit?

The Court: What's specifically is false is that in paragraph 5 the affiant spoke with a known subject who advised the affiant that a Jay had been selling crack. That's misleading because it appears that it occurred close in time to this affidavit. This affidavit was submitted to the magistrate in March of 2019, but the testimony was that he got that information from the CI and he was basing it based on the 11/5/2018 buy.

The March 2019 buy, the testimony was that the affiant confirmed that the vehicle was still in the driveway therefore appearing that illegal activity was still going on. But that is not what was stated here. And so that is not what was stated in the affidavit.

And that's why the Court ruled that the, there is, it is [sic] a deliberate false misleading statements in the affidavit that the magistrate relied on and that is an erroneous granting of the search warrant.

II. STANDARD OF REVIEW

This Court reviews for clear error the trial court's findings of fact at the evidentiary hearing, but we review de novo both "a trial court's ultimate determination on a motion to suppress" and any "underlying issues of law such as statutory questions or the application of a constitutional standard to uncontested facts." *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008); see also *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Mullen*, 282 Mich App at 22 (quotation marks and citation omitted).

This appeal also requires us to review the trial court's review of the sufficiency of the affidavit supporting the search warrant in this case. "[A]ppellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). This Court has previously explained the applicable standards of review in the same procedural context presented in the instant case:

> Whether a search is reasonable is a fact-intensive determination and must be measured by examining the totality of the circumstances. A reviewing court must give great deference to a magistrate's finding of probable cause to issue a search warrant. Accordingly, we do not review de novo the lower court's determination regarding the sufficiency of a search warrant affidavit. Rather, "this Court need only ask whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause." To find a substantial basis, we must "ensure that there is a fair probability that contraband or

evidence of a crime will be found in a particular place." [*Mullen*, 282 Mich App at 21-22 (citations omitted).]

III. ANALYSIS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [US Const, Am IV.]

The Michigan Constitution contains an analogous provision that states:

> The person, houses, papers, possessions, electronic data, and electronic communications of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things or to access electronic data or electronic communications shall issue without describing them, nor without probable cause, supported by oath or affirmation. . . . [Const 1963, art 1, § 11.]

Our Supreme Court held that this provision of the Michigan Constitution "is to be construed to provide the same protection as that secured by the Fourth Amendment, absent compelling reason to impose a different interpretation." *Slaughter*, 489 Mich at 311 (quotation marks and citation omitted).

Here, the prosecution argues that the trial court erred by suppressing the fruits of the search based on its finding that the affidavit contained deliberately false and misleading statements without properly analyzing whether the false statements and omissions were material to the determination of probable cause. The prosecution argues that the warrant affidavit was valid because the affidavit still establishes probable cause even after adding any improperly omitted information and striking any false information.

The United States Supreme Court has explained that the Fourth Amendment's Warrant Clause "surely takes the affiant's good faith as its premise: '[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . .' " *Franks v Delaware*, 438 US 154, 164; 98 S Ct 2674; 57 L Ed 2d 667 (1978) (alteration and ellipsis in original). "[A] warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter." *Id*. at 165. "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant." *Id*. at 171; see also *Mullen*, 282 Mich App at 23. However, a defendant may challenge the veracity of a search warrant affidavit and seek the suppression of evidence seized pursuant to the warrant. *Franks*, 438 US at 155-156, 164; *People v Franklin*, 500 Mich 92, 110-111; 894 NW2d 561 (2017).

More specifically, the United States Supreme Court held in *Franks*, 438 US at 155-156, that

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, *and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause*, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. [Emphasis added.]

The standards enunciated in *Franks* apply to material omissions from a search warrant affidavit as well. *Mullen*, 282 Mich at 24; *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992).

Nonetheless, merely establishing that the affiant police officer "intentionally or recklessly omitted relevant information does not, by itself, invalidate the warrant." *Mullen*, 282 Mich App at 23; accord *Franks*, 438 US at 156. Instead, the test is whether the "remaining information in the search warrant affidavit, after the improperly omitted information is added and the improper information is disregarded, is sufficient to form probable cause to issue [the] search warrant . . . ." *Mullen*, 282 Mich App at 27; see also *Franks*, 438 US at 156. "[A] search warrant and the underlying affidavit are to be read in a common-sense and realistic manner." *Russo*, 439 Mich at 604. There is probable cause to justify a search if the facts and circumstances, known to the officers at the time of the search, would "warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place." *Mullen*, 282 Mich App at 27 (quotation marks and citation omitted).

Here, the basis of the trial court's ruling is difficult to discern with any degree of precision. First, the trial court seemingly found the entire portion of the affidavit pertaining to Compton's experience and training to be irrelevant to the probable cause determination. In so holding, the trial court clearly committed an error of law. This Court has previously stated with respect to search warrant affidavits, "the affiant's experience is relevant to the establishment of probable cause." *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). The trial court also apparently found irrelevant the portion of the affidavit containing "generalizations of what normally goes on in drug cases." At least some of these statements, although purporting to be based on Compton's training and experience, actually amount to something more akin to drug profile evidence. "Drug profile evidence has been described as an informal compilation of characteristics often displayed by those trafficking in drugs." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690, 693 (1999) (quotation marks and citation omitted). Nonetheless, it is unclear from the trial court's ruling whether it struck all, or any particular portion, of the affidavit that contained statements of Compton's training and experience or statements relating to a drug trafficker profile. To the extent the trial court considered drug profile statements irrelevant in this particular affidavit, the prosecution has not contested that finding on appeal and we therefore do not address this issue further. Because we are remanding this matter for other reasons that will be explained below, the trial court should also clarify this ruling on remand.

Next, it appears that the trial court found that Compton's failure to indicate in the affidavit that the information in Paragraph 5 was initially gathered in November 2018 from the confidential informant, combined with the language in Paragraph 7 referring to the 48 hours prior to the date of the affidavit (March 19, 2019) being the only time period given in the affidavit, constituted a deliberately false and misleading indication that all of the information supporting probable cause in the affidavit occurred within approximately 48 hours of seeking the warrant. While reasonable minds could differ regarding whether these facts necessarily create such an implication when Paragraph 5 simply is silent regarding the time of occurrence and a reference to a time period only appears later in a completely separate paragraph, we cannot conclude that the trial court's ruling on this point was clearly erroneous. *Mullen*, 282 Mich App at 21-22.

It seems that the essence of the trial court's concern that led it to find that the affidavit contained deliberately false and misleading information was that the affidavit did not portray the manner in which Compton's investigation proceeded chronologically from the time he first received the tip from the confidential informant in November 2018 until the last controlled transaction on March 18, 2019.

However, even though the trial court found that there was deliberately false and misleading information in the affidavit as a result of Compton's omission of dates, that finding alone does not constitute a sufficient ground to void the warrant. *Mullen*, 282 Mich App at 23; *Franks*, 438 US at 156. The next step before a trial court may permissibly rule that the warrant is void is for the trial court to consider whether the "remaining information in the search warrant affidavit, after the improperly omitted information is added and the improper information is disregarded, is sufficient to form probable cause to issue [the] search warrant[.]" *Mullen*, 282 Mich App at 27; see also *Franks*, 438 US at 156.

Here, the trial court failed to apply this test before reaching its decision on the motion to suppress, thereby erring as a matter of law. *Id*. at 21. Compton testified at the evidentiary hearing that he first gathered the information contained in Paragraph 5 in November 2018 but also confirmed that this information was still accurate in March 2019 before conducting the March 18, 2019 controlled transaction. The trial court failed to consider whether the affidavit would have provided probable cause to support the search warrant with the addition of this clarifying information indicating that the information gathered initially in November 2018 was still accurate in March 2019.

We further note that the trial court's ruling also appeared to indicate that it found Compton's investigation leading up to the search warrant lacking because he did not conduct more surveillance between November and March, and we caution the trial court that this concern reflects a misunderstanding of the probable cause standard. "Probable cause does not require certainty. Rather, it requires only a probability or substantial chance of criminal activity." *Mullen*, 282 Mich App at 27 (quotation marks and citation omitted). "Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place." *Id*. (quotation marks and citation omitted). Establishing probable cause to support a search warrant does not mean beyond a reasonable doubt, by a preponderance of the evidence, or more probable than not; instead, probable cause "requires ' "only the probability, and not a prima facie showing, of criminal activity." ' "

Russo, 439 Mich at 607, quoting *Illinois v Gates*, 462 US 213, 235; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

Here, the affidavit included a description in Paragraph 7 of a controlled drug transaction conducted at the location to be searched, within 48 hours of the issuance of the warrant, and indicating that the confidential informant identified defendant as the seller of the drugs purchased. The trial court also failed to consider this untainted portion of the affidavit in its determination of probable cause. We direct the trial court to our decision in *People v Williams*, 139 Mich App 104, 108; 360 NW2d 585 (1984), overruled in part on other grounds by *Russo*, 439 Mich at 602 n 32, 602-603, where we held that a single controlled buy may be sufficient under the circumstances to establish probable cause, although we are also mindful that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules," *Gates*, 462 US at 232. Probable cause is determined by considering "the totality-of-the-circumstances." *Id*. at 238. It is difficult to imagine a trial court finding a lack of probable cause in a search warrant which is based on a controlled purchase of drugs without finding that the affidavit for the warrant entirely false. Here, it appears that the trial court believed the officer's testimony which formed the basis for the search warrant affidavit, while seemingly holding parts of the officer's affidavit misleading. However, the trial court failed to consider whether sufficient evidence existed for a finding of probable cause if the "deliberately misleading" portions of the search warrant were removed from consideration. Hence, because the trial court failed to properly conduct the next step of analyzing the sufficiency of the warrant after having found that part of it contained deliberately false or misleading information, *Mullen*, 282 Mich App at 27; *Franks*, 438 US at 156, we vacate the trial court's order suppressing the evidence and dismissing the charges and we remand for the trial court to further address this matter under the proper test as enunciated in *Franks* and *Mullen*.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Brock A. Swartzle