STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2013
v	No. 309559 Clinton Circuit Court
LISA MARIE OLGER, Defendant-Appellant.	LC No. 11-008750-FH

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant of manufacturing less than five kilograms or fewer than 20 marijuana plants, MCL 333.7401(2)(d)(*iii*).[1] The trial court sentenced defendant to 15 days in jail and three years' probation. Defendant appeals as of right. We affirm.

On April 1, 2011, Clinton County Sheriff's Detective Sergeant Robert Sipple executed a search warrant at defendant's residence and in the basement discovered growing and processed marihuana plants, multiple grow lights on electric timers with a ballast system to power the unit, fertilizers, and instructions on fertilizer use. Both "starter" plants and "mature" plants were scattered throughout the basement and kitchen area.

I. THE SEARCH WARRANT

Defendant contends that the search warrant was improperly issued and the evidence seized pursuant to the search is therefore inadmissible. "[A]ppellate scrutiny of a magistrate's decision [to issue a search warrant] involves neither de novo review nor application of an abuse of discretion standard. Rather, the preference for warrants . . . requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992) (citations omitted). "Probable cause to issue a search warrant exists where there is a

[1] Although the statute uses the spelling "marihuana," this Court uses the more common spelling, "marijuana," in its opinions.

'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

Defendant first argues that the affidavit did not provide sufficient probable cause to support the search warrant because there was a lack of personal knowledge to support the statements made by the named informant. "The magistrate's finding of reasonable or probable cause shall be based upon all facts related within the affidavit made before him or her." MCL 780.653. The affidavit may be based upon information supplied to the complainant by a named person if the affidavit contains "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information." MCL 780.653(a). Personal knowledge "should be derived from the information provided or material facts." *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). However, "[p]ersonal knowledge can be inferred from the stated facts. *People v Martin*, 271 Mich App 280, 302; 721 NW2d 815 (2006), citing *Stumpf*, 196 Mich App at 223.

Here, the informant admitted that he purchased marijuana from defendant's son on several occasions, and the last time he purchased marijuana from him was in the driveway of defendant's residence. The informant provided specific details regarding quantity and price of marijuana and identified defendant's house in a photograph as the house where he had purchased the marijuana. The informant also stated that defendant and her husband had a growing operation in the basement of this residence. The informant named by the affiant clearly had personal knowledge sufficient to sustain a finding of probable cause to search defendant's home. MCL 780.653. On this record and as presented in the trial court, we cannot conclude that defendant's challenge on this ground has merit.

B

Defendant argues that the warrant was stale since too much time had elapsed between the last drug purchase described in the affidavit and the issuance of the search warrant. However, "'staleness' is not a separate doctrine in probable cause to search analysis. It is merely an aspect of the [overall] inquiry." *Russo*, 439 Mich at 605. The measure of the staleness of information in support of a search warrant rests on the totality of the circumstances, where one of those circumstances is time. *Id.* In determining whether the information is stale, we consider factors such as "whether the crime is a single instance or an ongoing pattern of protracted violations [and] whether the inherent nature of a scheme suggests that it is probably continuing." *Id.* However, the main inquiry is whether there was a substantial basis to conclude that there was a fair probability that evidence of a crime will be found in a particular place. *People v Brown*, 279 Mich App 116, 128; 755 NW2d 664 (2008).

Here, the affidavit showed how the illegal activity constituted much more than a single sale and had been ongoing for some time. The informant stated that he purchased marijuana from defendant's son on several occasions and that he knew that defendant had a growing operation in the basement of her residence. This shows that the drug enterprise was ongoing and why it would be reasonable to conclude that evidence could still be found at the residence. Therefore, the warrant was not stale.

C

Defendant challenges the validity of the search warrant because it did not list the items to be seized with sufficient particularity. "A search warrant must particularly describe the place to be searched and the persons or things to be seized." *Martin*, 271 Mich App at 303. "The purpose of the particularity requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of unfettered discretion in determining what is subject to seizure." *Id.* at 304 (internal quotations omitted). "The degree of specificity required depends on the circumstances and types of items involved." *People v Zuccarini*, 172 Mich App 11, 15; 431 NW2d 446 (1988). Generally, to be deficient, the warrant must be "so general in its language or so lacking in particularity." *People v Unger*, 278 Mich App 210, 245; 749 NW2d 272 (2008).

In *Unger*, this Court held that "[a] general description, such as 'evidence of homicide,' is not overly broad if probable cause exists to allow such breadth." *Unger*, 278 Mich App at 246. The Court concluded that this description does not "authorize the seizure of all items, but, rather, only permitted the seizure of items that might reasonably be considered 'evidence of homicide.'" *Id.* at 245. "In other words, the warrant was 'sufficiently particular to pass constitutional muster since the executing officers' discretion in determining what was subject to seizure was limited to items related to [homicide].'" *Id.* at 245-246, quoting *Zuccarini*, 172 Mich App at 16 (alteration in *Unger*).

Here, the search warrant described the property to be searched and seized as "Illegally possessed drugs presently stored, manufactured or cultivated on the property, along with documentation of drug activity and proceeds thereof." Like the search warrant in *Unger*, 278 Mich App 210, the search warrant here is not overly broad because it does not authorize seizure of all items. Rather, it specifically directs the police officers to search for items limited to drugs and a drug growing operation, as well as any related documentation. This language is even more specific than the general language of "evidence of homicide," because it limits the police officers' discretion to seize items to illegal drugs and documentation of drug activity or proceeds. It cannot be said that this warrant is "so general in its language or so lacking in particularity." *Id.* at 245.

Defendant contends that "documentation of drug activity" did not allow the officers to seize the computer. However, a computer can reasonably be used to document drug activity and proceeds. Even assuming that the search warrant did not allow seizure of the computer, exclusion of the computer at trial would not have affected the outcome because the computer and any information that may have been recovered from it were not presented at trial.[2]

[2] The fact that a computer had been seized was only mentioned one time when Sipple testified that officers had seized a laptop computer.

D

Defendant challenges the validity of the search warrant on the ground that the affiant failed to disclose material information when he obtained the search warrant. The same standard that applies to false material contained in affidavits also applies to material omissions from affidavits. *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001). Thus, defendant must show "that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause." *Id.* Because there is a presumption that an affidavit supporting a search warrant is valid, "only when there have been *material* omissions *necessary to the finding of probable cause* may the resulting search warrant be invalidated." *People v Mullen*, 282 Mich App 14, 24; 762 NW2d 170 (2008) (emphasis in original).

Defendant argues that Sipple should have disclosed that the informant was facing felony charges and received a deal that inferentially was due to the information he provided to the police. However, this omission was not necessary to the finding of probable cause. "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." *Kazmierczak*, 461 Mich at 418. Defendant argues that this information was material because it affected the informant's credibility. But with a named informant, "it is not necessary to vouch for his credibility in the affidavit." *Ulman*, 244 Mich App at 514. Further, the information supplied in the affidavit lends some credibility to the informant and his statements. He specifically identified defendant's residence, the type of drug involved, and the growing operation in defendant's basement. Given this, there is no indication that the information regarding the informant's felony charges would have affected the magistrate's determination of probable cause, particularly because, as discussed in Issue II, the specificity in the informant's statements provided a substantial basis for inferring a fair probability that marihuana would be found at defendant's residence. Therefore, even if the omitted material was included in the affidavit, there would still be probable cause because the material only affects the credibility of the informant, and it was not necessary to vouch for this. Finally, defendant has not provided any evidence that Sipple knowingly and intentionally, or with a reckless disregard for the truth, omitted the information.

II. JUDICIAL IMPARTIALITY

Defendant contends that she was denied a fair and impartial trial because the trial court pierced the veil of judicial impartiality when it stated that "the issue of the validity of the search warrant in this matter has been dealt with by the Court, it is a legal issue, and you are not to make any assumptions that there was anything inappropriate about law enforcement being at the residence or challenge the basis, they were there legally and the Court has already determined that issue at a prior hearing." We disagree. The trial court's comment did not unduly influence the jury because the comment regarding a ruling made by the court is not a disputed factual issue but, rather, a legal issue that had already been decided by the trial court. *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011).

III. JURY INSTRUCTION

Defendant essentially argues that the trial court erred by refusing to instruct the jury on paragraphs (6) and (7) of CJI 2d 12.1, the instruction on unlawful manufacture of a controlled substance. Paragraphs (6) and (7) of CJI 2d 12.1 instruct as follows:

> (6) Fifth, that the defendant was not legally authorized to manufacture this substance.
>
> (7) Sixth, that the defendant was not (preparing/compounding) this substance for (his/her) own use. [CJI 2d 12.1.]

"Jury instructions must clearly present the case and applicable law to the jury." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *Id*. Jury instructions must be examined "as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). Reversal is only warranted if it is clear that the jury was misled by the instruction. *Id*. We review de novo claims of instructional error. *Martin*, 271 Mich App at 337.

The use notes for CJI 2d 12.1 make clear that paragraph (6) "should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to possess the substance." The notes further provide that paragraph (7) "should be given only if some evidence has been presented that the defendant prepared or compounded the substance for his or her own use." The defense presented no evidence at trial. Of the two prosecution witnesses to testify at trial, neither stated that defendant grew or used the marijuana for her own medical use. Because defendant presented no evidence that she was authorized to possess the substance and because no evidence was presented that defendant prepared or compounded the substance for her own use,[3] the evidence did not support an instruction on CJI 2d 12.1(6) and (7).

Defendant's reliance on our Supreme Court's decision in *People v Kolanek*, 491 Mich 382, 394-395; 817 NW2d 528 (2012), in support of his argument is misplaced. In *Kolanek*, the Court clarified that the affirmative defense provided in § 8 of the Michigan Medical Marijuana Act (MMMA), MCL 333.26428, does not require compliance with the requirements of § 4 of the MMMA. Therefore, an individual who possesses more than 2.5 ounces of usable marijuana or 12 marijuana plants, or whose plants are not kept in an enclosed, locked facility, may still be able to establish a § 8 defense. *Id.* at 403-404. If a defendant wishes to assert the § 8 defense, it "must be raised in a pretrial motion for an evidentiary hearing." *Kolanek*, 491 Mich at 410-411.

[3] The commentary to CJI 2d 12.1 also provides that paragraph (7) was amended in June 1991 "to reflect that the personal use exemption applies only to the preparation and compounding of a controlled substance and not to other acts of manufacturing."

If the defendant establishes the elements of § 8 during a pretrial evidentiary hearing, and there are no material questions of fact, then the defendant is entitled to dismissal of the charges. *Kolanek*, 491 Mich at 412. If the defendant establishes evidence of each element listed in § 8 but there are still material questions of fact, then the § 8 affirmative defense must be submitted to the jury. *Id.* Finally, if no reasonable juror could conclude that a defendant has satisfied the elements of the § 8 defense, then the defendant is precluded from asserting the defense at trial. *Id*.

Although *Kolanek* allows a defendant to use § 8 as an affirmative defense to marijuana charges, defendant must raise it in a pretrial motion. Defendant did not. Consequently, defendant neither established evidence of each element listed in § 8, nor raised material questions of fact that must be submitted to the jury.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Michael J. Riordan