

STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff-Appellant

v

Michael David Keller
Melinda Sue Keller

Defendants-Appellees

Supreme Court No. 131223, 131224

Lower Court No. 2005-016145-FH

2005-016144-FH

Court of Appeals Nos. 264865,265118

Honorable Geoffrey Neithercut

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DEFENDANT-APPELLEE'S (SUPPLEMENTAL)
BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Submitted by:

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**STATEMENT OF BASIS OF JURISDICTION
FOR THE SUPREME COURT**

On May 18, 2006, the Genesee County prosecutor filed an application for leave to appeal *People v Michael and Melinda Keller*, Court of Appeals Docket No. 264865 decided March 30, 2006. In an order dated December 15, 2006, the Court ordered the parties to submit supplemental briefs.

STATEMENT OF FACTS

On May 18, 2006, the Genesee County prosecutor's office filed an application for leave to appeal Court of Appeals decision *People v Keller* docket no. 264865. In an order dated December 15, 2006, the Court ordered:

“The parties shall submit supplemental briefs with 56 days of the determination of indigency, and they should address; (1) whether the presence in the defendants' trash of a small amount of marijuana constituted probable cause justifying the search; (2) assuming there was a Fourth Amendment violation whether the police acted in objectively reasonable good-faith reliance on the warrant; (3) whether the search violated MCL 780.653; and (4) assuming the search violated MCL 780.653, but not the Fourth Amendment, whether the trial court elected a proper remedy by permitting the defense to argue to the jury that police misled magistrate and violated Michigan law in their efforts to obtain a search warrant.”

Other relevant facts with appropriate page references are cited in the Argument portion *infra*.

ARGUMENT

I

THE INFORMATION CONTAINED IN THE SEARCH WARRANT AFFIDAVIT REGARDING THE TRASH PULL EVIDENCE IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE.

Excluding the information from the unnamed informer the affidavit also contains the allegation the affiant participated in a trash pull in front of the residence located at 3828 Maryland, Flint, Michigan on November 30, 2004, and found on suspected marijuana roach, a green leafy substance on the side of a pizza box and several pieces of correspondence addressed to Michael/ Melinda Keller at the Maryland residence. (See paragraph 8 of affidavit). The affiant field tested the suspected marijuana which tested positive for the presence of marijuana.

The marijuana residue discovered during the trash pull falls far short of the level of corroboration adequate under state and federal law. *Illinois v Gates*, 462 US 213; 103 S Ct 2317; 76 LEd2d 527 (1983) pointed to *Draper v United States*, 358 US 307; 79 S Ct 329; 3 LEd2d 327 (1959) as the classic case on the value of corroborative efforts of police officials. *Gates* at 462 US 242. In *Draper*, a tip informed the police of when Draper would arrive in a certain city, what he looked like, what he would be wearing and most important, that Draper would be carrying heroin. *Draper*, 358 US at 309. The police verified every piece of information except the heroin possession, and then got a search warrant, after which they discovered the heroin. *Id* at 313. *Gates* specifically approved the corroboration and the valid detailed tip that created the probable cause.

In this case, in contrast, the police did not corroborate anything in the tip itself and did not observe any suspicious activity in front of the Keller home. The affidavit merely asserted the existence of an extremely small quantity of marijuana remnants in trash that was abandoned in front of the Keller family home. There was no evidence that anything found in the trash was ever

in the possession of Melinda or Michael Keller. The very constitutionality of trash pulls is premised on the idea that individuals have no privacy interests in garbage once they have placed it in a location where it is accessible to the public because anyone passing by is free to remove items from or deposit items in the garbage. *California v Greenwood*, 486 US 35; 105 S Ct 1625; 100 LEd2d 30 (1988) It is difficult to fathom how contraband found in garbage that no longer belonged to either Melinda or Michael Keller, (if it ever belonged to either of them) can be used to establish probable cause to search their home long after their privacy interest, as well as their ability to control what has been put in the garbage receptacle, has been lost. As the Supreme Court said in *Greenwood*, the depositing of garbage on a public street, where it is readily accessible to animals, children, scavengers, snoops, and other members of the public negates any reasonable exception of privacy in whatever is contained within that garbage. *Id* at 260

People v Thivierge, 174 Mich App 258 (1988) does not support the proposition that a trash pull yielding marijuana remnants independently establishes probable cause to search. The *Thivierge* court was not asked to decide whether a garbage yield of marijuana remnants alone was enough to create probable cause because the search warrant was premised on the trash pull proceeds along with other evidence and that other evidence was cited in the affidavit in support of the warrant. *Id* at 260 In *Thivierge* the Court of Appeals never addressed the issue of whether the affidavit supported a finding of probable cause. The issue was whether a trash pull was an illegal search.

In *People v Hall*, 158 Mich App 194 (1987), trash pulls were again of issue. The Court of Appeals held that the search warrant as a whole was adequate to establish probable cause. The court declined to address the defense challenge to a trash pull that yielded a trash bag containing cocaine traces. *Id* at 197-198

The affidavit in this case alleged an anonymous tip that a large amount of marijuana was being sold and manufactured at 3828 Maryland and made reference to a hidden room used to

manufacture marijuana. Then it alleged a trash pull where a minute quantity of marijuana was discovered. A surveillance of the property by the police disclosed no unusual activity. In this case no independently obtained evidence was obtained to strengthen the trash pull evidence. The trash pull alone could not establish probable cause.

The Court's review is de novo as an appellate court will exercise its own independent judgement in deciding whether the relief granted or denied was appropriate under the facts.

Attorney General v Biewer Co, 140 Mich App 1 (1985); *Beason v Beason*, 435 Mich 791 (1990)

ARGUMENT

II

THE GOOD FAITH RELIANCE ON THE WARRANT EXCEPTION DOES NOT APPLY WHERE THE AFFIANT KNOWINGLY AND INTENTIONALLY, OR WITH RECKLESS DISREGARD FOR THE TRUTH, INSERTED FALSE MATERIAL INTO THE AFFIDAVIT AND THAT THE FALSE MATERIAL WAS NECESSARY TO A FINDING OF PROBABLE CAUSE.

In *People v Chandler*, 211 Mich App 604 (1995), the court of Appeals considered a claim that an affidavit in support of a search warrant request contained material omissions. The court discussed the applicable law on review of such claims:

“In *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 LEd2d 667 (1978), the Supreme Court held that where an Affidavit in support of a search warrant contains false statements made knowingly or recklessly, evidence obtained pursuant to the warrant must be suppressed. If the false information was necessary to a finding of probable cause.” 211 Mich App at 612-613.

The court continued that in order to prevail on a motion to suppress evidence, the defendant must show by a preponderance of the evidence that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit, and that the false material was necessary to a finding of probable cause, citing *People v Stumpf*, 196 Mich App 218, 224 (1992). The Court of Appeals extended the *Franks* rule to material omissions in *People v Kort*, 162 Mich App 680 (1987).

The good faith exception does not apply in this situation. This exception, first recognized by the Supreme Court in *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 LEd2d 677 (1984), operates to save from suppression evidence seized by police officers who reasonably relied on a

warrant that was issued by a neutral magistrate but later determined to be invalid. The Court in *People v Goldston*, 470 Mich 523 (2004), adopted the reasoning of the Court in *Leon* and decided the exclusionary rule would not bar the admission of evidence seized in reasonable good faith reliance on a search warrant ultimately found to be defective. There are, however, four exceptions to the good faith exception, including (1) where the issuing magistrate was misled by an affidavit containing information that the affiant knew was false or of to which he recklessly disregarded the truth; (2) where the issuing magistrate acted as merely a rubber stamp for the police rather than as a neutral and detached judicial officer; (3) where the affidavit in support of the warrant was nothing more than a “bare bones” affidavit; and (4) where the affidavit supporting the application fails to particularize the place to be searched or the thing to be seized. *Leon supra* at 3421. See *People v Hellstrom*, 264 Mich App 187 (2004), where the Court of Appeals was willing to apply the good faith exception because the warrant described the items to be seized with sufficient particularity, and there was no reason to believe the facts in the affidavit were false or misleading. In this case the affiant alleged she received an anonymous tip about marijuana at 3828 Maryland. In reality it was an anonymous crime stoppers tip from an unknown informant. As argued in Argument I above that without this false information there was not sufficient information in the affidavit to establish probable cause.

De novo review is the standard for which an appellate court will exercise its own in deciding whether the relief granted or denied was appropriate under the facts. *Attorney General v Biewer*, 140 Mich App 1, (1985); *Beason v Beason*, 435 Mich 791 (1990).

ARGUMENT

III

THE SEARCH CLEARLY VIOLATED THE REQUIREMENTS OF MCL 780.653

MCL 780.653 provides; “The magistrates findings of reasonable or probable cause shall be based upon all facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains one of the following:

*

*

*

- b) If the person is unnamed, the affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or the information is reliable.

The affidavit in this case states the following:

“That during the past several weeks your affiant received an anonymous tip stating that large quantities of marijuana was being sold and manufactured out of 3828 Maryland, City of Flint, Genesee County, Michigan. The tipster also indicated that there is a hidden room used for manufacturing marijuana inside said residence.”

The above allegation was based on an anonymous tip. There is nothing which would indicate to the magistrate that the tipster spoke with personal knowledge of the information. Nor are there affirmative allegations that either the unnamed person is credible or the information reliable. The requirements of MCL 780.653 were clearly violated.

There are no allegations that the informant had ever supplied good information in the past. *People V Chartand*, 73 Mich App 645 (1977) The warrant does not assert that the informant ever made controlled buys at that address or any other address at any other time. *People v David*, 119 Mich App 289 (1982) *Iv den* 417 Mich 858 (1983) There are no allegations that the informant has always been truthful and never lied to the affiant. *People v Gleason*, 122 Mich App 482 (1983). The absence from an affidavit of any facts bearing on the informant's credibility rendered it clearly deficient under MCL 780.653 as construed in *People v Sherbine*, 421 Mich 502 (1984). Where an informer is neither a police officer, a victim nor an uninvolved eyewitness there must be some corroboration of the informant's statement or some prior contact with the informant that would enable the police to assess his/her credibility. *People v White*, 392 Mich 404 (1974), cert den 420 US 912 (1975).

The statute was amended in 1988, which modified the affidavit requirements contained in *Sherbine, supra.* In *People v James Lucas*, 188 Mich App 554 (1991) the Court of Appeals discussed the change of MCL 780.653. The *Lucas* court held the informant's information in that case was sufficient pursuant to MCL 780.653 because

“In this case, the information supplied by the informant was that the defendant was a dealer, who could supply large quantities of cocaine. The informant described defendant in detail, including his appearance, his address, the type of car he drove. The informant personally arranged for defendant to sell large quantities of cocaine the next day at the restaurant parking lot. Defendant's apparent willingness to participate in this was verified by the affiant, who had listened to the conversation between the informant and defendant during which the details of the transaction were finalized. From the investigation and surveillance of the defendant, the police were able to verify the information supplied by the informant.”

Lucas, Supra at 569

In this case an entirely different scenario is presented. There is nothing listed in the warrant to verify any information and show it is reliable and there is nothing in the warrant to show the information credible. The proper interpretation of a statute is a question of law to be reviewed de novo. *People v Adams*, 262 Mich App 89 (2004)

ARGUMENT

IV

THE TRIAL COURT'S REMEDY IN THIS CASE WAS PROPER FOR A SEARCH THAT SOLELY VIOLATED MCL 780.653.

In *People v Hawkins*, 468 Mich 488 (2003) the court held that violation of the statutory requirements of MCL 780.653 pertaining to establishing the reliability of an unnamed informant whose information is submitted on an affidavit in support of a search warrant does not require suppression of the evidence seized during the search. Suppression is not the remedy because the language of the statute does not provide for it.

In this case the Honorable Geoffrey L. Neithercut determined as follows:

“The information was not reliable. The tip was anonymous, it was not reliable. It was not a valid basis to issue a search warrant and in the old days, this court would suppress that warrant. But because of the case of *People v Hawkins*, *People v Scherf*, 468 Mich 488, the supreme court in its current wisdom has found that while the statute exists, since it does not specifically lay a remedy of suppression that—in that this court’s textualist manner, they will not order suppression and will not allow suppression to be ordered by trial courts. And we accept their ruling. They are the Supreme Court.

However—so I deny your motion to suppress, Mr. Zimmer, however, I note that I – this court will allow

You in trial to argue to the jury that the police department deliberately conducted or mislead a magistrate when seeking the search warrant. And normally we don't allow the jury to hear about the search warrant issues, but you will be able to go into those entirely because there is a statute that talks about it, which is relevant to this case.”
(M.H.T.p.13)

Recently in *People v Anstey*, 476 Mich 436 (2006), the Court held that neither exclusion nor dismissal was an appropriate remedy where the defendant's statutory right to an independent chemical test under MCL 257 625a (6) (d). In *Anstey* the Court concluded that “because the Legislature did not provide a remedy in the statute we may not create a remedy that only the Legislature has the power to create. *Anstey, supra*, at 445. The Court held that an instruction to the jury was proper because “the judiciary has the inherent authority to instruct the jury regarding a violation of the statute does not create such a remedy.” *Anstey supra* at 445.

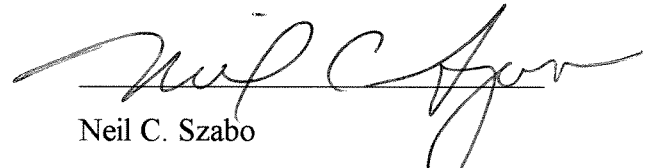
Likewise, in this case the trial court ordered that the jury may be informed on the violation of MCL 780.653. The affidavit would be relevant as to how the police came to discover the marijuana at 3828 Maryland. Informing the jury of the circumstances of how the police obtained the search warrant such as misrepresenting the tip was made directly to the police when it in fact was made Crime Stoppers would help prevent future violations of MCL 780.653. It also reflects on the credibility of the affiant. The proper interpretation of a statute is a question of law that will be reviewed de novo. *People v Adams*, 262 Mich App 89 (2004).

PRAYER FOR RELIEF

WHEREFORE Defendant-Appellees' respectively request that leave be denied and/or the Court of Appeals be affirmed.

Respectfully submitted,

Dated: 1-22-07


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