STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 21, 2013
v	No. 307079 Macomb Circuit Court
WILLIAM THEODORE MCCLEESE, Defendant-Appellant.	LC No. 2011-000364-FH

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

In this interlocutory appeal, defendant[1] appeals by leave granted the circuit court's orders (1) granting the prosecution's motion to preclude defendant from asserting a defense under the Medical Marihuana Act (MMA), MCL 333.26421 *et seq*., and (2) denying defendant's motion to suppress evidence or to hold a hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). We reverse both orders.

I

In granting the prosecution's motion to preclude defendant from asserting a defense under the MMA, the circuit court relied on *People v King*, 291 Mich App 503, 505; 804 NW2d 911 (2011), wherein this Court had ruled that a person may not assert a defense under the MMA if he or she has not complied with the limitations set forth in MCL 333.26424.

However, *King* has been reversed. In *People v Kolanek*, 491 Mich 382, 410; 817 NW2d 528 (2012), our Supreme Court held that any patient or person, in any prosecution involving marihuana, may assert the affirmative defense of medical use of marihuana under MCL 333.26428 and that such a defense shall be presumed valid if its elements can be established. A defendant is entitled to move for dismissal under MCL 333.26428 and is not required to establish

[1] Defendant has been charged with delivery or manufacture of 5 to 45 kilograms of marihuana, MCL 333.7401(2)(d)(*ii*), and maintaining a drug house, MCL 333.7405(1)(d).

the immunity requirements of MCL 333.26424[2] in order to do so. *Kolanek*, 491 Mich at 404. Accordingly, we reverse the circuit court's order granting the prosecution's motion to preclude defendant from asserting a defense under the MMA.

II

We also reverse the circuit court's order denying defendant's motion to suppress evidence that was obtained pursuant to an invalid search warrant. Appellate review of a magistrate's finding of probable cause involves neither de novo review nor application of the abuse of discretion standard. *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006). We must ask only whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *Id*.

"It is settled law that probable cause to search must exist at the time the search warrant is issued . . . and that probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched." *People v Russo*, 439 Mich 584, 606-607; 487 NW2d 698 (1992).

We conclude that the affidavit filed in support of the search warrant in this case did not provide a substantial basis for the magistrate's finding of probable cause.

The statements in paragraphs 2, 3, and 15 of the affidavit, namely that defendant was "the leader of a continuing criminal enterprise," involved in "drug trafficking activities and money laundering," and "concealing evidence from his drug trafficking activities and . . . money laundering activities," were merely conclusory, self-serving assertions and should have been disregarded by the magistrate. *People v Lucas*, 188 Mich App 554, 569-570; 470 NW2d 460 (1991). Further, the averments in paragraphs 9, 10, and 11 of the affidavit failed to comply with the requirements of MCL 780.653(b). These paragraphs contained only conclusory statements claiming that certain unnamed informants had personal knowledge, were credible, or had reliable information. Because these averments did not comply with the statutory requirements, they should have been stricken from the affidavit. See *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). We note that "the use of rumors or reputations" is insufficient to justify the issuance of a search warrant. *Id*. It is likewise insufficient for the affiant to recite that he or she has personal knowledge without providing supporting material facts. *Id*.

Additionally, the averments set forth in paragraphs 10, 11, and 14 of the affidavit contained stale information. The statements in paragraphs 10 and 11 would not have allowed a reasonable person to believe that evidence of a crime or contraband would be discovered in defendant's home *at the time* the search warrant was issued. *People v Brown*, 279 Mich App

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[2] MCL 333.26424(d) establishes a rebuttable presumption that "a qualifying patient or primary caregiver is engaged in the medical use of marihuana . . . if the qualifying patient or primary caregiver: (1) is in possession of a registry identification card; and (2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act."

116, 128; 755 NW2d 664 (2008). Similarly, the statements in paragraphs 12, 13, and 14, namely that defendant had been convicted of other narcotics-related offenses in the past, that he had been arrested in 1987, and that his home had been searched previously, were stale and did not provide up-to-date or relevant information sufficient to justify the issuance of the warrant. *Id*. Even if defendant's home had contained evidence of narcotics activity or other contraband in the past, the averments set forth in the affidavit were not adequately fresh to allow the magistrate to infer that any of these items remained on the premises. *People v Osborn*, 122 Mich App 63, 66; 329 NW2d 533 (1982).

Other averments in the affidavit were misleading or false. The statement in paragraph 14 of the affidavit that defendant "has several arrests for large amounts of narcotics" was simply untrue. In addition, the affiant averred in paragraph 5 that defendant had "over $100,000 . . . on deposit with Comerica Bank" and that this amount was "narcotics proceeds or at the very least co-mingled with proceeds from . . . narcotic trafficking activities." This bald accusation was in no way based on the personal knowledge of the affiant or anyone else. MCL 780.653(a) and (b). Indeed, as the record evidence established, the $100,000 to which the affiant referred was actually a retirement account that defendant had held for some time.

The most critical omission from the affidavit underlying the search warrant was any timely evidence—either by way of a confidential informant, a controlled buy, or otherwise—that narcotics or the proceeds of narcotics were actually present *in defendant's home*. Absent any such evidence, it was purely speculative for the magistrate to determine that there was probable cause to believe that contraband would be found in the place to be searched.

The affidavit was insufficient as a matter of law to create a substantial basis for the magistrate's finding of probable cause that evidence of criminal conduct would be found in defendant's home. *Russo*, 439 Mich at 606-607; *Martin*, 271 Mich App at 297.

Nor did the police rely on the search warrant in good faith. See *United States v Leon*, 468 US 897, 920-921; 104 S Ct 3405; 82 L Ed 2d 677 (1984); *People v Goldston*, 470 Mich 523, 542-543; 682 NW2d 479 (2004). The police officer who swore out the affidavit underlying the search warrant was one of the very same officers who executed the search on defendant's home. As explained, that officer had provided false and misleading information in the affidavit. The good-faith exception does not apply when the affidavit underlying the search warrant contains a false or misleading statement made knowingly or with reckless disregard for its truth. *Leon*, 468 US at 923; *United States v West*, 520 F3d 604, 612 (CA 6, 2008). Therefore, having provided misleading statements to the magistrate by way of the affidavit, the officer-affiant cannot be found to have relied on the resulting search warrant in good faith. *Id*.

III

We conclude that the affidavit underlying the search warrant was insufficient on its face, see MCL 780.651(1), and that the false and misleading material contained in the affidavit was necessary to establish probable cause, *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000). Consequently, we perceive no need to remand for a *Franks* hearing in the court below.

IV

In sum, we reverse the circuit court's order granting the prosecution's motion to preclude defendant from asserting a defense under the MMA. We also reverse the circuit court's order denying defendant's motion to suppress. The search warrant issued in this case was invalid.

Reversed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood