STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 11, 2013
V	No. 307087 Oakland Circuit Court
ANTHONY FRANCIS SALERNO, Defendant-Appellant.	LC No. 2010-234766-FH

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to deliver marijuana, MCL 750.157a and MCL 333.7401(2)(d)(iii), and possession of marijuana, MCL 333.7403(2)(d), for which he was sentenced to two years' probation. He appeals as of right. We affirm.

Defendant's convictions arise from his involvement in a marijuana trafficking operation. Defendant was arrested after the police executed a search warrant at his Royal Oak apartment on April 23, 2010. Inside the apartment officers discovered 140.1 grams of marijuana, drug packaging materials, drug ledgers, and more than $20,000. Testimony at trial indicated that defendant was part of a network of individuals who were trafficking marijuana in Michigan, California, and Connecticut. On one occasion in February 2010, Andrew Poag flew to Detroit, where Ari Ribitwer and Poag thereafter met California residents Tyson Fitzpatrick and Rhett Cross at a Detroit hotel. Fitzpatrick and Cross possessed 100 pounds of marijuana. Poag and Seth Goldman arranged for Fitzpatrick and Cross to sell some of the marijuana to defendant. Ribitwer and Poag went to defendant's apartment to show samples. Defendant eventually purchased 10 pounds of marijuana from Fitzpatrick and Cross for $48,000. After defendant's arrest, he made statements admitting his participation in the drug transaction at his apartment but claimed to have purchased a much smaller amount.

I. MOTION TO DISQUALIFY THE OAKLAND COUNTY PROSECUTOR

Defendant first argues that the trial court abused its discretion in denying his motion to disqualify Oakland County Prosecutor Jessica Cooper and her staff from this case due to an alleged conflict of interest between prosecution witness Ari Ribitwer and the Oakland County prosecutor. The asserted conflict of interest was based on the fact that attorneys Mitchell and Debra Ribitwer (Ribitwer's parents), attorney Robyn Frankel (Mitchell Ribitwer's fiancée), and Sandra Frankel (Robyn Frankel's mother) each made campaign contributions to Oakland County

Prosecutor Jessica R. Cooper. Debra made a $75 campaign contribution on July 14, 2010, between the time of Ribitwer's arrest and when he formally agreed to assist the prosecution. Mitchell, Robyn, and Sandra made contributions of $100, $325, and $500, respectively, to Prosecutor Cooper's election campaign in 2008. Defendant also asserted that Sandra and Prosecutor Cooper were long-term personal friends. Defendant argues that disqualification of the entire prosecutor's office was required because of the existence of both personal and financial conflicts of interest with the elected county prosecutor that affected his right to a fair prosecution. We disagree.

We review a trial court's decision regarding a motion to disqualify a prosecutor for an abuse of discretion. *People v Petri*, 279 Mich App 407, 423-424; 760 NW2d 882 (2008). "[T]he determination whether a conflict of interest exists sufficient to require disqualification of the prosecuting attorney is a question of fact that is reviewed on appeal for clear error. Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004) (citation omitted).

"The disqualification of a prosecutor because of a conflict of interest can occur in situations where the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with *the accused*." *People v Mayhew*, 236 Mich App 112, 126-127; 600 NW2d 370 (1999) (emphasis added). A party moving for disqualification of a prosecutor based on a conflict of interest has the burden of showing both the conflict of interest and specific prejudice. *People v Waterstone*, 287 Mich App 368, 380; 789 NW2d 669 (2010), rev'd on other grounds 486 Mich 942 (2010).

Defendant's argument is principally based on his claim that a close association between the county prosecutor and Ribitwer's family resulted in a conflict of interest that led to Ribitwer receiving special treatment. However, a prosecutor's decision not to prosecute a suspected criminal does not fall within any definition of "conflict of interest." *People v Herrick*, 216 Mich App 594, 599-600; 550 NW2d 541 (1996). Moreover, defendant has shown nothing more than that a witness's family and friends made contributions to a prosecutor's election campaign. Defendant has not shown that those contributions, or any alleged personal relationship between the prosecutor and the witness's family or friends, establish a personal, financial, or emotional interest in the prosecution of *defendant*, the accused. There is no financial or personal relationship between the prosecutor and defendant.

Although defendant asserts that he is not raising a claim of selective prosecution, the focus of his argument is directed at challenging the prosecutor's decision to prosecute defendant, while offering immunity to Ribitwer. The power to decide on charging decisions is vested entirely with the prosecutor. *People v Barksdale*, 219 Mich App 484, 487; 556 NW2d 521 (1996). And that power is abused only if a choice is made for reasons that are unconstitutional, illegal, or ultra vires. *Id.* at 488.

Here, defendant does not claim that the prosecutor engaged in selective prosecution for reasons that are prohibited by law or the Constitution. *People v Russell*, 266 Mich App 307, 316; 703 NW2d 107 (2005). Instead, defendant continues to challenge the prosecutor's motivation for negotiating the immunity agreement with Ribitwer. Because defendant has not demonstrated an actual conflict of interest, particularly with respect to the prosecution of defendant, there is no

merit to his argument that disqualification of the prosecutor's office was warranted. *Waterstone*, 287 Mich App at 380. Therefore, the trial court did not err in denying defendant's motion for disqualification.

II. MOTION TO SUPPRESS EVIDENCE

Defendant next argues that the trial court erred in denying his motion to suppress the evidence seized from his Royal Oak apartment during the execution of the search warrant. Defendant claims that the search warrant was invalid because the search warrant affidavit was based on stale and incomplete information. Again, we disagree. When reviewing a motion to suppress evidence, we review a trial court's findings of fact for clear error and review its ultimate decision on whether to suppress the evidence de novo. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009). We also review de novo the question of whether a Fourth Amendment violation occurred. *Id.*

A search warrant may not issue unless probable cause exists to justify the search. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651. "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, 417-418; 605 NW2d 667 (2000). The magistrate's findings of probable cause must be based on the facts related within the affidavit. MCL 780.653; *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). The affiant "must state the matters that justify the drawing of inferences," and "the affiant's experience is relevant to the establishment of probable cause." *People v Waclawski*, 286 Mich App 634, 698; 780 NW2d 321 (2009). In assessing a magistrate's decision with regard to probable cause, a reviewing court must evaluate the search warrant and underlying affidavit in a commonsense and realistic manner in determining whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for a finding of probable cause. *People v Russo*, 439 Mich 584, 603-605; 487 NW2d 698 (1992); *People v Poole*, 218 Mich App 702, 705; 555 NW2d 485 (1996).

Defendant argues that the warrant was stale because too much time had elapsed between the only known observation of drugs in his apartment in mid-February 2010 and the issuance of the search warrant on April 22, 2010. Although the passage of time is a valid consideration in deciding whether probable cause exists, "'staleness' is not a separate doctrine" in the analysis. *Russo*, 439 Mich at 605. Instead, it is merely one aspect of the overall inquiry. *Id.* In determining whether the information is stale, this Court also considers factors such as the nature of the property sought, the place to be searched, and the character of the crime, i.e., "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.* at 605-606; see also *People v McGhee*, 255 Mich App 623, 636; 662 NW2d 777 (2003). The overriding 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).

In this case, the affidavit supported an inference that the illegal activity involved more than a single sale and was ongoing. Initially, the affiant described his experience, stating:

> Your affiant has been employed as a Special Agent of the Drug Enforcement Administration (DEA) since 1996 and has participated in numerous investigations involving violations of federal and state narcotic and money laundering laws. Your affiant has attended schools and has been instructed in many aspects of narcotics investigations and is familiar with the laws promulgated under Title 21 of the United States Code.

The affiant averred that after receiving a tip regarding a large-scale marijuana distribution operation, law enforcement officers executed several search warrants on February 23, 2010: (1) the search of Fitzpatrick's Detroit loft resulted in the seizure of 66 pounds of marijuana, drug paraphernalia (e.g., drug ledgers, drug packaging, and scales), and $7,000 in drug proceeds; (2) the search of Goldman's Birmingham house resulted in the seizure of drug ledgers; and (3) the search of a vehicle resulted in the seizure of more than $150,000. The drug ledgers listed defendant by name, with notations for high-quality marijuana next to his name. Ribitwer explained to the affiant that the drug ledger found in Goldman's house indicated that defendant had purchased a pound of marijuana from Goldman, which sold for more than $5,000. Ribitwer had described to law enforcement the marijuana transaction at defendant's apartment on approximately February 16, 2010, when defendant purchased 10 pounds of marijuana from Fitzpatrick and Cross for $48,000, and Goldman also purchased marijuana. Ribitwer also described how he had purchased marijuana from defendant on other occasions. The affidavit stated:

> Ribitwer stated that he has visited [defendant] at his Royal Oak address on approximately five occasions (late 2009 until February 2010). Ribitwer stated that he personally purchased, via cash, small quantities of marijuana from [defendant] at [defendant's] Royal Oak residence on about three occasions (late 2009 until February 2010). Ribitwer has known [defendant] for approximately one year. Ribitwer stated that he is not aware of [defendant] having any legitimate employment during this time. Ribitwer stated that he knows that [defendant] supports himself, at least in part, through illegal sales of marijuana. Ribitwer is also aware that [defendant] supports himself via illegal sales of marijuana through conversations with Goldman.

The affiant averred that information provided by Ribitwer was used on March 24, 2010, to obtain a search warrant for Poag's California residence, where law enforcement seized 54 marijuana plants, pound quantities of packaged marijuana, and drug ledgers. During the execution of this search warrant, law enforcement arrested Cross, who was carrying over $14,000 and pound quantities of marijuana. A search of Cross's residence uncovered about 140 additional marijuana plants. On March 24, 2010, Poag told law enforcement officers about the marijuana transaction at defendant's apartment in February 2010. The affiant also relied on Cross's March 24, 2010, statement, which detailed the marijuana transaction at defendant's apartment in February 2010. Cross stated that defendant and Goldman had purchased about 15 pounds of marijuana from Fitzpatrick. The affiant noted that the information provided by Cross, Poag, and Ribitwer regarding a large drug transaction at defendant's residence was consistent. The affiant further averred that on April 22, 2010, he conducted additional investigation to verify that defendant was still involved in the distribution of marijuana:

> On 04-22-10, your affiant contacted the management of the condominium building that includes the requested search warrant location. Your affiant was advised that [defendant] is the current resident of Unit 509. Management also advised that another resident of the building, within the last three months, advised management about the smell of marijuana emanating from Unit 509. On 04-22-10, your affiant observed that the front door of Unit 509 contains a strip of carpet attached to the bottom of the door. Your affiant observed that the other unit doors on that floor did not have any obstruction (i.e. carpet) at the bottom of their doors. Your affiant knows from his training and experience and that of other law enforcement officers that marijuana traffickers will sometimes try to seal the venting points (i.e. under doors, chimney vents, air ducts etc.) within their drug storage locations/residences. In this manner, the trafficker can reduce the smell of marijuana (burned or otherwise) from being noticed by persons outside of the premises and thereby lessen the possibility that law enforcement will be notified as to the presence of marijuana at the location.

The affiant provided the following reasons why evidence of a conspiracy to distribute marijuana would likely be found at defendant's residence:

> Your affiant contends that the information provided by Ribitwer, relative to the marijuana conspiracy in general and the marijuana activities of [defendant] in particular, is corroborated by the drug ledgers seized from Seth Goldman (see paragraph #8), the post *Miranda* statements of Rhett Cross and Andrew Poag and the seizures/search warrants made thus far in the investigation. The on-going nature of [defendant's] marijuana activities is further corroborated by your affiant's observation of the attempt to seal the front door of the residence and the information from the management of the condominium complex relative to the smell of marijuana emanating from the residence. . . . Your affiant contends that the seizure of drug ledgers from three residences (Seth Goldman's residence, Andrew Poag's residence and 2915 John R., Detroit, Michigan) utilized by members of this conspiracy makes it likely that [defendant's] residence will also contain drug ledgers.

The information in the affidavit provided a substantial basis for inferring a fair probability that evidence of a conspiracy to distribute marijuana could be found in defendant's apartment on April 23, 2010. The affidavit contained facts showing that the February 2010 transaction was not an isolated incident and that a drug trafficking operation was continuing at the time the warrant was requested. Three different participants of the drug enterprise, Ribitwer, Poag, and Cross, informed law enforcement officers that defendant had purchased at least 10 pounds of marijuana from Fitzpatrick and Cross at defendant's apartment in February 2010. Because this was a large amount of marijuana to be sold in small increments, there was probable cause to believe that some of the marijuana remained at defendant's apartment two months later. Moreover, Ribitwer indicated that he had personally purchased marijuana from defendant at his residence on more than one occasion. At a minimum, there was probable cause to believe that ledgers, materials, and equipment for trafficking marijuana would be found at defendant's apartment. In addition, after the February 2010 transaction, law enforcement officers continued to investigate the drug conspiracy by executing search warrants and interviewing the

coconspirators. On the day the warrant was signed, the affiant observed a strip of carpet attached to the bottom of defendant's apartment door, which the affiant knew from his experience was a method often used by marijuana traffickers to conceal the odor of marijuana. Considering the continuing nature of the crime of drug trafficking and the ongoing investigation of the drug conspiracy, the warrant was not stale. Moreover, viewing the search warrant and affidavit in a commonsense and realistic manner, there was a substantial basis to conclude that there was a fair probability that evidence of drug trafficking would be found at defendant's apartment. Accordingly, the trial court did not err in denying defendant's motion to suppress on this basis.

Defendant also challenges the validity of the search warrant because the supporting affidavit omitted information that defendant possessed a valid medical marijuana card under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. In *People v Brown*, 297 Mich App 670; 825 NW2d 91 (2012), this Court recently explained that to establish probable cause, a search-warrant affidavit need not provide a substantial basis for inferring that defenses under the MMMA do not apply. *Id.* at 674-675. Because it was not necessary that the search warrant affidavit provide specific facts regarding whether defendant had a medical marijuana card or any other defense under the MMMA, the omission of that information from the affidavit did not affect the validity of the search warrant.

III. PLAINTIFF'S MOTION TO STRIKE A DEFENSE WITNESS

Defendant lastly argues that the trial court abused its discretion by granting the prosecution's "last minute" motion to strike a defense witness, Joseph Rozell, who was the county's director of elections. The court concluded that Rozell's proposed testimony was not relevant to any issue at trial. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.'" *Id.* (citation omitted).

A trial court has the authority and discretion to manage its dockets, based on the circumstances of the individual case. See MCR 1.105; MCR 2.401. It is well established that the trial court has a duty to control trial proceedings and "to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." MCL 768.29. The court has wide discretion and power in fulfilling that duty. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006).

In this case, the trial court properly exercised its discretion in considering the prosecutor's untimely motion to strike a defense witness whose testimony was not relevant to the issues at trial. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Rozell's proposed testimony did not meet the minimum threshold for relevancy under MRE 401. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). Defendant's purpose in calling Rozell was to elicit testimony regarding the monetary contributions made by Ribitwer's parents to the Oakland County prosecutor, which defendant claimed was relevant to demonstrate that Ribitwer lacked credibility or was biased. But defendant has not explained how other people's campaign contributions were relevant to

establish Ribitwer's credibility or bias. Rather, it was the existence of Ribitwer's allegedly favorable immunity agreement – not the prosecutor's alleged motivation for offering that agreement – that was relevant to Ribitwer's credibility, bias, and interest in testifying. Defendant was permitted to fully explore the existence of that agreement at trial. Consequently, the trial court did not abuse its discretion in striking Rozell as a witness at trial.

Defendant also argues that he was denied his right to present a defense. Although a defendant has a constitutional right to present a defense and to confront his accusers, US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). The Michigan Rules of Evidence prohibits the admission of evidence that is not relevant. MRE 402. Thus, "[t]he right to present a defense extends only to *relevant* evidence." *People v Danto*, 294 Mich App 596, 604; 822 NW2d 600 (2011). Because defendant failed to establish how Rozell's testimony was relevant under the rules of evidence, the trial court did not violate defendant's constitutional right to present a defense when it precluded Rozell from testifying.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause