

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0345

STATE OF LOUISIANA

VERSUS

ATANACIO GUERRERO, JR.

Judgment rendered: SEP 10 2010

**On Appeal from the 16th Judicial District Court
Parish of St. Mary, State of Louisiana
Docket Number: 2009-178706
The Honorable John E. Conery, Judge Presiding**

**J. Phil Haney
District Attorney
Jeffrey J. Trosclair
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**Counsel for Appellee
State of Louisiana**

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Morgan City, Louisiana**

**Counsel for Appellant
Atanacio Guerrero**

BEFORE: KUHN, PETTIGREW, JJ., KLINE, J., *pro tempore*¹

¹ Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

KLINE, J.

The defendant, Atanacio Guerrero, Jr., was charged by bill of information with possession of marijuana with intent to distribute, a violation of La. R.S. 40:966(A)(1); possession of methamphetamine with intent to distribute, a violation of La. R.S. 40:967(A)(1); and possession of drug paraphernalia, a violation of La. R.S. 40:1023. He pled not guilty to all charges. The defendant moved to suppress the evidence and statements. Following a hearing, the trial court denied the motion.

Thereafter, the defendant withdrew his former not guilty pleas and pled guilty to possession of methamphetamine in excess of 28 grams but less than 200 grams pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976), reserving his right to challenge the trial court's ruling on the motion to suppress. The state dismissed the remaining charges. Following a **Boykin** examination, the trial court accepted the defendant's guilty plea and sentenced him to imprisonment at hard labor for five years without the benefit of probation, parole or suspension of sentence. The defendant was also ordered to pay a fine of \$50,000 plus court costs. The defendant now appeals, urging two assignments of error, as follows:

1. The trial court erred in denying the defendant's motion to suppress the evidence seized from the residence located at 420 Duke Street, Morgan City, Louisiana during the execution of a search warrant on December 15, 2008;
2. The trial court erred in denying the defendant's motion to suppress the inculpatory statements made during the execution of the search warrant on December 15, 2008.

For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

Because the defendant pled guilty, the facts of the offense were not fully developed at a trial. The following facts were gleaned from the testimony presented at the hearing on the motion to suppress.

On December 15, 2008, Agent Duvall Arthur, III, of the St. Mary Parish Sheriff's Office, executed a search warrant of the defendant's residence at 420 Duke Street in Morgan City, Louisiana. The warrant was signed by 16th Judicial District Court Judge Lori Landry earlier that day. The affidavit of probable cause provided, in pertinent part, as follows:

Probable cause is based on the following: On December 1, 2008 [a]gents with the St. Mary Parish Sheriff's Narcotics Task Force received information from a confidential informant who will hereafter be referred to as CI to protect his/her identity. This CI advised that there was a white male subject known to the CI as Atanacio Guerrero who was selling illegal narcotics from the residence of 420 Duke St. in Morgan City, La. This CI agreed to assist [a]gents with an investigation of illegal narcotics sales from the residence. The CI then met with [a]gents at a predetermined location where the CI was searched and found to be free of any contraband and or monies. The CI was equipped with an audio transmitter for safety and monitoring purposes and was issued police marked monies to facilitate the transaction. The CI then went to a local business in Morgan City, La. where the CI made contact with a white male subject known to the RCI as Atanacio Guerrero. The CI then conversed, negotiated and made a purchase of suspected [m]arijuana from Guerrero. The CI then met with [a]gents at a predetermined location where the suspected [m]arijuana was turned over to Agt. Duval Arthur III. The CI was again searched and found to be free of any contraband and or monies. The suspected [m]arijuana was tagged and placed into the evidence vault.

On December 15, 2008, [a]gents [were] contacted by a reliable and confidential informant who will hereafter be referred to as RCI to protect his/her identity. This RCI advised that there was a white male subject known to the RCI as Atanacio Guerrero who was selling illegal narcotics from the residence of 420 Duke St. in Morgan City. This RCI agreed to assist agents with an investigation of illegal narcotics sales from the residence. Agents then set up surveillance on Guerrero's residence of 420 Duke St. The RCI met with [a]gents at a predetermined location where the RCI was searched and found to be free of any contraband and or monies. The RCI was equipped with an audio transmitter for safety and monitoring purposes and was issued police marked monies to facilitate the transaction. The RCI made contact with Guerrero and was instructed to meet him at a local business. Agents that were conducting surveillance on Guerrero's residence observed him leave his residence and followed him to the business to meet with the RCI. The RCI also traveled to the local business in Morgan City, La. where the RCI made contact with a white male subject known to the RCI as Atanacio Guerrero. The RCI then conversed, negotiated and made a purchase of suspected [m]arijuana from Guerrero. The meeting between Guerrero and the RCI was concluded.

Agents then followed Guerrero as he departed the business and traveled back to his residence. When Guerrero arrived at his residence surveillance was terminated. The RCI then met with other [a]gents at a predetermined location where the suspected [m]arijuana was turned over to Agt. Duval Arthur III. The RCI was again searched and found to be free of any contraband and or monies. The suspected [m]arijuana was tagged and placed into the evidence vault.

With the signed warrant in hand, Agent Arthur and several other narcotics agents conducted the search. The officers entered the residence and found the defendant inside a bedroom, standing near the bed with a large ice chest container filled with suspected marijuana. Digital scales, cellophane bags of marijuana and methamphetamine were also found on the bed. The defendant was detained while the remaining officers swept the residence to determine if there were any other occupants. The defendant's mother was located. In response to the detention of his mother, the defendant stated, "She had nothing to do with this...[s]he doesn't have a key to my bedroom. It is padlocked." The illegal narcotics and other items were seized, and the defendant was arrested. Scientific analysis revealed that approximately 4,305 grams of marijuana and 75 grams of methamphetamine were recovered from the defendant's residence in connection with the search.

**ASSIGNMENTS OF ERROR 1 & 2
DENIAL OF MOTION TO SUPPRESS
THE EVIDENCE AND STATEMENTS**

In these assignments of error, the defendant argues the trial court erred in failing to suppress the evidence seized and the statements made during the search of his residence. The defendant argues that the search of his residence should not be upheld because the warrant authorizing the search was based upon an affidavit that was insufficient to support a finding of probable cause. Specifically, the defendant asserts the information contained in the affidavit failed to establish a sufficient nexus between the items sought (marijuana) and the place to be searched (his residence). He further argues that the reliability of the CI was not described in the affidavit and the information provided by the CI was "unverified." Finally, the defendant argues

that any statements made during the search of the residence were fruits of the unlawful search without a valid search warrant.

Article 1, § 5 of the Louisiana Constitution requires that a search warrant may issue only upon an affidavit establishing probable cause to the satisfaction of an impartial magistrate. See also La. Code Crim. P. art. 162. Probable cause exists when the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched. **State v. Johnson**, 408 So.2d 1280, 1283 (La. 1982). The facts establishing the existence of probable cause for the warrant must be contained within the four corners of the affidavit. **State v. Duncan**, 420 So.2d 1105, 1108 (La. 1982).

Affidavits, by their nature, are brief, and some factual details must be omitted. Unless the omission is willful and calculated to conceal information that would indicate that there is not probable cause or would indicate that the source of other factual information in the affidavit is tainted, the omission will not change an otherwise good warrant into a bad one. In matters relating to the possibility that a warrant contains intentional misrepresentations, the question of the credibility of the witnesses is within the sound discretion of the trier of fact. His factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence. The harsh result of quashing a search warrant, when the affidavit supports a finding of probable cause, should obtain only when the trial judge expressly finds an intentional misrepresentation to the issuing magistrate. **State v. Fugler**, 97-1936, pp. 24-25 (La. App. 1st Cir. 9/25/98), 721 So.2d 1, 19, rehearing granted and amended in part on other grounds, 97-1936 (La. App. 1st Cir. 5/14/99), 737 So.2d 894, writ denied, 99-1686 (La. 11/19/99), 749 So.2d 668.

If the basis for the existence of probable cause is the tip of an informant, the affiant must articulate the basis for his belief that the informant is trustworthy. This may be done by showing circumstances where the informant has given reliable information in the past. The affidavit must also indicate the underlying circumstances from which the informant concluded that the drugs were where he said they would be. This may be done by reciting that the informant personally observed the drugs under the circumstances recited. An allegation of past reliability is not necessarily a *sine qua non* to sufficiency of probable cause as long as a common-sense reading of the affidavit supports the conclusion that the informant is credible and his information is reliable. See State v. Clay, 408 So.2d 1295 (La. 1982).

The review of a magistrate's determination of probable cause prior to issuing a warrant is entitled to significant deference by reviewing courts. "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review." **Illinois v. Gates**, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983). Further, because of the preference to be accorded to warrants, marginal cases should be resolved in favor of a finding that the issuing magistrate's judgment was reasonable. **State v. Rodrigue**, 437 So.2d 830, 833 (La. 1983). The burden of proof is on the defendant to prove the ground of his motion to suppress. La. Code Crim. P. art. 703(D).

In the instant case, the defendant argues that the affidavit submitted with the search warrant application was insufficient to establish probable cause because it failed to provide a sufficient nexus between his residence and any illegal contraband. In support of this argument, the defendant notes that although the affidavit suggests that the CI advised that the defendant was selling marijuana "from the residence," at the hearing on the motion to suppress, Agent Arthur testified that the CI advised that the defendant did not sell the illegal narcotics

directly from his residence. Instead, he conducted transactions at other predetermined locations. The defendant argues that the misstatement of information in the affidavit was an intentional misrepresentation by Agent Arthur to deceive the judge issuing the warrant. The defendant further argues that Judge Landry would not have issued the search warrant absent this misrepresentation.

Our review of the evidence presented at the motion to suppress hearing reveals, as the trial court correctly noted in its written reasons for ruling, the affidavit contains some potentially misleading information. First, the affidavit specifically provides that the CI stated that the defendant sold illegal drugs “from the residence.” However, as the defendant correctly points out, Agent Arthur’s testimony established this was not a true statement. Agent Arthur testified that even prior to the first controlled purchase, the CI indicated that the defendant did not conduct drug transactions at his residence. The trial court, in its reasons, noted that the statement regarding drug sales from the home was simply Agent Arthur relaying “the information communicated by the confidential informant[.]” Thus, any suggestion that drugs were being transacted at the residence is inaccurate.

Nevertheless, the affidavit goes on to provide details of two separate controlled marijuana purchases transacted by the defendant. Since both of the controlled buys (which served to test the reliability of the CI and formed the basis of the probable-cause determination) were completed at a location other than the defendant’s residence, we find the unintentional misrepresentation regarding drug sales from the defendant’s residence to be immaterial as to the ultimate determination of probable cause.

In denying the motion as it relates to the sufficiency of the nexus between the defendant’s residence and the illegal drugs in this case, the trial court relied on **State v. Williams**, 2003-0302 (La. App. 4 Cir. 10/6/03), 859 So.2d 751, writ denied, 2004-3093 (La. 11/28/05), 916 So.2d 133 and **State v. Hunter**, 632 So.2d

786 (La. App. 1st Cir. 1993), writ denied, 94-0752 (La. 6/17/94), 638 So.2d 1092.

In **Williams**, the defendant argued that the trial court erred in denying the motion to suppress the evidence seized from his residence because the affidavit on which the officers relied to obtain the search warrant did not set forth sufficient probable cause to support issuing a warrant for that location. In summarizing the general rules regarding search warrants, the Fourth Circuit quoted the Louisiana Supreme Court's ruling in **State v. Casey**, 99-0023, p. 4 (La. 1/26/00), 775 So.2d 1022, 1028, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000), where the Court stated, in pertinent part, that: "a search warrant must establish a probable continuing nexus between the place sought to be searched and the property sought to be seized." It was further noted by the Fourth Circuit that: "[i]n determining whether a magistrate could reasonably infer from the facts set forth in the search warrant application that drugs were likely located in the seller's residence, the jurisprudence has held that 'there need not be definite proof that the seller keeps his supply at his residence.'" "[I]t will suffice if there are some additional facts, such as that the seller went to his home prior to the sale or that the sale occurred near the home, which would support the inference that the supply is probably located there.'" **State v. Williams**, 2003-0302 at p. 3, 859 So.2d at 756 (quoting **Wayne R. LaFave, Search and Seizure** § 3.7(d)(3rd ed. 1996)).

In **Hunter**, the police sought a warrant to search the defendant's residence for marijuana and other drug paraphernalia. In their affidavit in support of the warrant application, the detectives stated that a confidential informant had performed a "controlled buy" of marijuana from the defendant, and the police had kept the defendant under surveillance during the transaction. The defendant left the purchase location to "go get the marijuana," returned to his residence and then returned to the purchase location to complete the transaction. Although the affiant did not conduct surveillance of the residence itself or state the contraband was

actually observed at the residence, this court held that the affidavit “provided a substantial basis for believing that [the defendant] had obtained the marijuana for the controlled buy from [his] residence.” **State v. Hunter**, 632 So.2d at 788-89.

Applying **Hunter**, the trial court concluded that based on the information contained in the affidavit in this case, the issuing judge was entitled to make a “reasonable common-sense” decision (based upon the two controlled buys, one in which the defendant was under surveillance as he left his residence, completed the sale and returned to his residence) and infer that a suspected drug dealer would store his contraband at his residence. We agree. Considering that Agent Arthur conducted surveillance of the defendant as he departed from his residence to meet the CI to conduct the drug transaction and he returned directly to his residence afterwards, it was reasonable to conclude that it was likely the defendant stored illegal drugs at his residence.

An issuing magistrate must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a “fair probability” that evidence of a crime will be found in a particular place. **State v. Byrd**, 568 So.2d 554, 559 (La. 1990). The process of determining probable cause for the issuance of a search warrant does not involve certainties or proof beyond a reasonable doubt, or even a prima facie showing, but rather involves probabilities of human behavior, as understood by persons trained in law enforcement and as based on the totality of circumstances. The process simply requires that enough information be presented to the issuing magistrate to enable him to determine that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal justice system. See **State v. Rodrigue**, 437 So.2d at 832-33.

We further conclude that the affidavit in this case was sufficient to establish probable cause despite the defendant’s contention that the reliability of the CI was

not established. First, the informant in this case was confidential, not anonymous. Second, the information provided by the CI was not the sole factual basis for the finding of probable cause. The information provided by the CI was tested by the officers in two separate controlled drug transactions. These transactions and the surveillance of the defendant's movement before and after the second transaction provided the basis for a finding of probable cause. At the hearing on the motion to suppress, Agent Arthur explained that, although the CI was not initially considered to be a reliable source of information, once the first controlled marijuana purchase was successfully completed, the informant was deemed reliable. At that point, in the affidavit, the CI was referred to as RCI (reliable confidential informant). Although the information in the affidavit could be read as the CI and the RCI being two different informants, the trial court found that the info regarding the two controlled buys to be sufficient to support the issuance of the warrant.

Under the facts and circumstances of this case, the trial court did not abuse its discretion in denying the motion to suppress based on the allegations in the affidavit. The trial court did not err in concluding that the search warrant established probable cause since the facts and circumstances were sufficient to support a reasonable belief that an offense had been committed and that evidence or contraband would be found at the place to be searched. There is no indication Agent Arthur intended to deceive the judge who signed the warrant. Excising any misrepresentations in the affidavit, and considering any alleged omissions, probable cause for issuance of the warrant still existed.²

Considering the foregoing, the defendant's claim that the statements he made during the execution of the search warrant should have been suppressed under the fruit of the poisonous tree doctrine lacks merit. Since the search in this

² Since we do not conclude that the search warrant in this case was deficient, we need not analyze the applicability of the good-faith exception of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

case was not unlawful, it did not result in any poisonous fruits. All of the evidence seized and statements made during the execution of the warrant were admissible.

These assignments of error lack merit.

DECREE

For the foregoing reasons, we affirm the conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED