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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO JAVIER GASTELUM,

Defendant and Appellant.

B263642

(Los Angeles County
Super. Ct. No. BA424744)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall and Shelly Torrealba, Judges. Reversed and remanded.

John J. Uribe, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

The Monterey Park Police Department applied for a search warrant and executed it at the residence of defendant Francisco Gastelum, recovering narcotics, an unloaded firearm and bundles of currency. Gastelum moved to quash the warrant and suppress the evidence recovered, arguing the magistrate issued the search warrant without a showing of probable cause. The warrant affidavit was based on a tip from another police department and described an illegal narcotics investigation involving a different suspect that had occurred at least four and one-half months before the detective sought the warrant in this case. The trial court conducted an in camera hearing, during which it reviewed the sealed search warrant, and denied the motion to quash and suppress.

A jury found Gastelum guilty of possession of a controlled substance for sale (Health & Saf. Code, § 11351) and found true the special allegations that the amount of heroin found exceeded 10 kilograms (Health & Saf. Code, § 11370.4, subd. (a)(3)) and Gastelum was personally armed with a firearm in the commission of the offense (Pen. Code, § 12022, subd. (c)). The jury also found Gastelum guilty of having proceeds over \$25,000 derived from controlled substance offenses (Health & Saf. Code, § 11370.9, subd. (a)) and child endangerment (Pen. Code, § 273a, subd. (a)). The trial court sentenced Gastelum to 20 years in state prison.

Gastelum appealed from the judgment contending, among other things, the trial court erred in denying his motion to quash the search warrant and declining to suppress the evidence recovered. Based on our review of the public and sealed versions of the search warrant, we agree with Gastelum's argument the affidavit in support of the warrant lacked probable cause and

contained stale information too remote in time to establish a fair probability officers would find evidence of a crime or contraband at his residence. We also agree with his argument the good faith exception will not save from suppression the evidence recovered under this defective warrant because it was objectively unreasonable for the detective who drafted the affidavit and executed the warrant to believe the warrant was based on probable cause to search Gastelum's residence.

The trial court erred in denying the motion to quash the search warrant and declining to suppress the evidence. Accordingly, we reverse the judgment.

BACKGROUND

Shortly after 9:00 a.m. on May 14, 2014, detectives from the Monterey Park Police Department detained Gastelum outside a Starbucks coffeehouse. For a few hours that morning, the detectives had conducted surveillance at Gastelum's nearby residence, based on a tip from another police department regarding narcotics activities (described below). During the surveillance, the detectives watched Gastelum wash a car (a yellow Ford Mustang) and then followed as he drove the car to Starbucks.¹ The detectives approached him as he sat in his car outside Starbucks, told him he was under investigation for illegal narcotics activities, and asked to search his car. Gastelum

¹ At trial, a detective testified that about an hour before Gastelum drove to Starbucks, his 10-year-old son entered the home, and then Gastelum walked his son from the home to an elementary school across the street. Gastelum returned home alone. The detective did not include these facts in the search warrant application, but the prosecutor presented this evidence at trial in support of the child endangerment charge.

consented to the search, which did not uncover evidence of narcotics activities. He refused consent for a search of his residence. Detective Swain Wukelich applied for a warrant to search Gastelum's residence and other vehicles for evidence of narcotics activities (including heroin, methamphetamine, cocaine, and currency), while Gastelum remained with the other detectives outside Starbucks.

In support of the search warrant application, Detective Wukelich prepared the following probable cause statement, which we quote in full:²

"On 5-13-14 I spoke to Detective Richard Trujillo from the Anaheim Police Department. Detective Trujillo told me last year (2013) he was conducting a cocaine investigation into a residence located at 8828 Olympic Blvd., Pico Rivera, CA 90660.

"On the same date, I spoke with Detective Rick Mangarin from the Anaheim Police Department. Detective Mangarin told me he was working an illegal narcotic investigation with Detective Trujillo. Detective Mangarin told me he was investigating a male Hispanic for illegal narcotic sales. During Detective Mangarin's investigation he witnesses his suspect meet with an unknown male Hispanic who was driving a white GMC bearing CA license plate 8T34647. Detective Mangarin's suspect

² The probable cause statement from which we quote appears in the search warrant attached to Gastelum's motion to quash, which is included in the public portion of the record on appeal. The record on appeal also includes a sealed version of the search warrant, which we independently reviewed. The sealed version does not contain any additional information supporting the probable cause determination that is not in the public version.

handed a large bag to the driver of the white GMC truck (CA/8T34647). Detective Mangarin believes the large bag contained illegal narcotics. Detective Mangarin told me the truck was registered to a Francisco Gastelum at 8828 Olympic Blvd in the City of Pico Rivera. Detective Mangarin told me he eventually arrested his suspect for illegal narcotic activities.

“Based on Detective Mangarin and Trujillo’s information I decided to start an illegal narcotics investigation into the residence at 8828 Olympic Blvd in the City of Pico Rivera.

“Through MPPD resources I was able to obtain a DMV photograph of Francisco Gastelum.

“On 5-14-14 LA IMPACT detectives started surveillance at 8828 Olympic Blvd in the City of Pico Rivera. When I arrived at the location I saw a gray Nissan bearing CA license plate [number]^[3] and a white GMC truck, bearing CA license plate number 8T34647 parked in the driveway at 8828 Olympic Blvd. The GMC is the same truck Detective Mangarin saw involved in [an] illegal cocaine transaction.

“On the same date at approx. 0700 hours I saw a male Hispanic later identified as Francisco Gastelum, from his DMV photograph, exit the front door of 8828 Olympic Blvd and entered a yellow Ford Mustang, bearing CA license plate number Gastelum then drove the yellow Mustang onto the front yard where he washed it.

“On the same date at approx. 0900 hours Gastelum entered the yellow Ford Mustang and drove to Star Bucks [*sic*] at 9333

³ We redact two license plate numbers that are not relevant to the probable cause determination.

Whittier Blvd in the City of Pico Rivera where he parked and appeared to be waiting for something or someone.

“Based on Detective Mangarin and Trujillo’s information and the observations from Your Affiant I decided to contact Gastelum as he sat inside his vehicle. Also based on Your Affiant’s training and experience I believe if given permission to search the residence at 8828 Olympic Blvd in the City of Pico Rivera, it will result in the seizure of illegal narcotics, US currency earned from illegal narcotics and the arrest of individuals involved with illegal narcotic activities.”

A magistrate signed the search warrant later the same morning. At around 1:00 p.m., the detectives executed the warrant at Gastelum’s residence at 8828 Olympic Boulevard in Pico Rivera. They were still detaining Gastelum at that time. In a garage attached to the house, the detectives recovered two cardboard boxes containing a total of 11 kilograms of brown powder heroin. In a closet in Gastelum’s bedroom, they recovered an unloaded semiautomatic Beretta handgun (registered to Gastelum) and a box of ammunition. Also in Gastelum’s bedroom, the detectives recovered stacks of U.S. currency, totaling \$97,987. Some stacks were bundled in rubber bands in a brown paper bag in the closet, and some in a gift bag. Other currency was loose in an envelope in a dresser drawer in the bedroom.

Before trial, Gastelum filed a motion to quash the search warrant and suppress the evidence recovered, arguing the magistrate issued the warrant without probable cause. In her opposition, without setting forth any facts purportedly supporting probable cause for issuance of the warrant, the District Attorney argued: “The People contend that once the court has conducted

an in camera review of the challenged warrant, including the sealed portion, the facts supporting probable cause will be abundantly clear.” The District Attorney also asserted the trial court should not suppress the evidence recovered, even if it found the warrant defective, because “Detective Wukelich acted in reasonable and objective good faith in relying upon the warrant and in serving the warrant.”

On February 6, 2015, the trial court (Judge Henry J. Hall) held an in camera hearing, outside the presence of the parties, during which it unsealed, reviewed and resealed the search warrant. Later, in open court in the presence of the parties, the court denied the motion to quash and declined to suppress the evidence recovered, finding the affidavit “does contain more than ample probable cause that is not stale to support the issuance of the warrant.” Because the court found probable cause, it did not reach the good faith exception issue.

At trial (before Judge Shelly Torrealba), the prosecution presented evidence of the narcotics, firearm and currency the police recovered during the search of Gastelum’s residence. Detective Wukelich testified and opined that Gastelum’s residence served as a “stash house” where illegal narcotics and money earned from illegal narcotics were stored. Evidence presented by both the prosecution and the defense indicated Gastelum agreed to store the boxes containing the heroin and then deliver them to someone else. The prosecution presented evidence that after his arrest, Gastelum admitted he knew the boxes contained illegal narcotics but maintained the money recovered was money he had saved over the years from his employment. Gastelum testified at trial, however, that he did not know the boxes he agreed to store contained illegal narcotics but

did know one of them contained money, which he removed from the box in the garage and stored inside the house for safekeeping until such time as he delivered the boxes and money to their intended recipient.⁴

As set forth above, the jury found Gastelum guilty of possession of heroin for sale, in an amount exceeding 10 kilograms and while personally armed with a firearm; having proceeds over \$25,000 derived from controlled substance offenses; and child endangerment. The trial court sentenced him to 20 years in state prison.

DISCUSSION

Gastelum contends the trial court erred in denying his motion to quash the search warrant and declining to suppress the evidence recovered from the search of his residence. As previously discussed, he argues the magistrate issued the warrant without probable cause and the good faith exception does not apply to save the evidence from suppression.

The Warrant Is Not Supported by Probable Cause

“The Fourth Amendment to the United States Constitution guarantees that ‘no warrants shall issue, but upon probable cause, supported by oath or affirmation’” (*People v. Robinson* (2010) 47 Cal.4th 1104, 1131.) “Probable cause to search exists when, based upon the totality of the circumstances described in the [search warrant] affidavit, ‘there is a fair probability that contraband or evidence of a crime will be found

⁴ A more detailed recitation of the evidence presented at trial is not necessary for our review of the ruling on the motion to quash the search warrant and suppress the evidence recovered.

in a particular place.” (*People v. Farley* (2009) 46 Cal.4th 1053, 1098, quoting *Illinois v. Gates* (1983) 462 U.S. 213, 238.)

“Information that is remote in time may be deemed stale and thus unworthy of consideration in determining whether an affidavit for a search warrant is supported by probable cause. Such information is deemed stale unless it consists of facts so closely related to the time of the issuance of the warrant that it justifies a finding of probable cause at that time. The question of staleness turns on the facts of each particular case. [Citations.] If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale.” (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652.)

“Although there is no bright line rule indicating when information becomes stale [citation], delays of more than four weeks are generally considered insufficient to demonstrate present probable cause.” (*Id.* at p. 1652.)

A magistrate’s determination “is to be sustained by reviewing courts as long as there was a ‘substantial basis’ for his [or her] conclusion that the legitimate objects of the search were ‘probably present’ on the specified premises.” (*Skelton v. Superior Court* (1969) 1 Cal.3d 144, 153; *Illinois v. Gates, supra*, 462 U.S. at p. 238.) Whether a magistrate had a substantial basis for concluding there was probable cause to search is a question of law and therefore subject to independent review. (*People v. Camarella* (1991) 54 Cal.3d 592, 601-602.)

Detective Wukelich’s affidavit did not establish probable cause for a search of Gastelum’s residence. The tip from the Anaheim Police Department was stale and therefore did not tend to show a fair probability that contraband or evidence of a crime

would be found at Gastelum’s residence on May 14, 2014. The fact Detective Wukelich received the tip the day before he applied for the warrant is of no significance because the information in the tip was stale. Anaheim Police Department Detectives Trujillo and Mangarin “conduct[ed] a cocaine investigation into a residence located at 8828 Olympic Blvd., Pico Rivera [Gastelum’s residence]” *sometime in 2013*—at a minimum, four and one-half months before the magistrate issued the warrant in this case, but perhaps more than one year before.⁵ As set forth above, “delays of more than four weeks are generally considered insufficient to demonstrate present probable cause.” (*People v. Hulland, supra*, 110 Cal.App.4th at p. 1652.) The target of the Anaheim Police Department investigation was not Gastelum, and the suspect was arrested on a date not specified. There is nothing in the affidavit indicating the activities investigated by the Anaheim Police Department were continuing after the suspect was arrested.

During the 2013 investigation, Detective Mangarin observed the suspect hand a large bag to an unidentified male,

⁵ Although the Attorney General argues Detectives Trujillo and Mangarin might have been referring to two separate investigations, one closer in time to the issuance of the search warrant than the other, a fair reading of the affidavit demonstrates the two Anaheim Police Department detectives told Detective Wukelich about one joint investigation that occurred sometime in 2013. To the extent Detective Mangarin was referring to a separate investigation, occurring in a timeframe not indicated in the affidavit, the language Detective Wukelich used indicates the illegal narcotics activity that was the subject of that investigation was remote in time (e.g., “Detective Mangarin told me he eventually arrested his suspect for illegal narcotics activities”).

driving a white truck registered to Gastelum at 8828 Olympic Boulevard. Detective Mangarin did not know what the bag contained, but speculated it was “illegal narcotics.” The Anaheim Police Department apparently did not make an arrest based on that incident and did not identify Gastelum as the driver of the truck.

As stated in the affidavit, based on the tip from the Anaheim Police Department, Detective Wukelich and his team conducted surveillance outside 8828 Olympic Boulevard for a few hours. They saw the same white truck parked at the residence. But they did not observe any activity at the residence that would indicate illegal narcotics activity. Gastelum washed a yellow Ford Mustang—that is all Detective Wukelich noted in his affidavit regarding activities at the residence during the brief surveillance.

Then, about 9:00 a.m., the detectives followed Gastelum to Starbucks. Detective Wukelich stated in the affidavit that Gastelum “appeared to be waiting for something or someone,” but did not explain what if anything might have given him the impression Gastelum was engaged in illegal narcotics activity. Detective Wukelich did not observe Gastelum holding a bag or see someone approach the yellow Mustang. Nonetheless, the team of detectives moved in and searched the car (recovering nothing) and detained Gastelum while Detective Wukelich went to obtain the search warrant.

The warrant was not supported by probable cause to search Gastelum’s residence on May 14, 2014. Based on the affidavit, all Detective Wukelich knew was that an Anaheim Police Department investigation conducted the year before at Gastelum’s residence resulted in the arrest of a suspect (not

Gastelum) for illegal narcotics activities. The affidavit does not state that anyone ever observed Gastelum engage in illegal narcotics activity. He was not identified as the driver of the white truck who received the bag of unknown contents in 2013. And the affidavit does not describe any suspicious activity of Gastelum during the three-hour surveillance conducted on the day Detective Wukelich applied for and executed the search warrant. Because the magistrate did not have a substantial basis for concluding there was probable cause to search Gastelum's residence, the trial court erred in denying the motion to quash the warrant.⁶

The Good Faith Exception Does Not Apply

Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment is inadmissible. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655-656.) In *United States v. Leon* (1984) 468 U.S. 897, the United States Supreme Court announced an exception to the exclusionary rule of the Fourth Amendment, allowing "the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." (*Id.* at p. 900.) This exception does not apply in all "cases where an officer has obtained a warrant and abided by its terms." (*Id.* at p. 922.) The exclusionary rule applies and suppression "remains an appropriate remedy" where a search warrant affidavit is "so

⁶ As explained above, we have independently reviewed the sealed version of the search warrant and it contains no additional information supporting the magistrate's probable cause determination.

lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” (*Id.* at p. 923.) Under such circumstances, an officer cannot “manifest objective good faith in relying on [the] warrant.” (*Ibid.*) The fact that a magistrate found probable cause and issued the warrant “is of no significance” in determining whether the officer acted in good faith. (*People v. Camarella, supra*, 54 Cal.3d at p. 605.)

We conclude it was objectively unreasonable as a matter of law for Detective Wukelich to believe the warrant he drafted was supported by probable cause to search Gastelum’s residence. There was no basis stated in his affidavit for a belief that there was continuing illegal narcotics activity occurring at the residence. After all, the information supplied by the Anaheim Police Department was a minimum of four and one-half months old. Moreover, the affidavit does not describe any conduct indicating Gastelum was engaged in illegal narcotics activity on or around May 14, 2014 (or in 2013, for that matter). Armed with a stale tip from another police department and a three-hour surveillance which uncovered no illegal activity, Detective Wukelich sought a warrant to search Gastelum’s residence. The affidavit does not include facts demonstrating this was an emergency situation where immediate action was needed instead of a longer surveillance. Detective Wukelich did not act in good faith in drafting, applying for and relying on a warrant containing clearly stale information and no current known illegal activity. We note the affidavit was craftily drafted, highlighting the date the tip was received (the day before the warrant was sought) to make the information appear current. At the same time, Detective Wukelich left vague the dates of the 2013

Anaheim Police Department investigation to make it appear less stale.

The trial court erred in declining to suppress the heroin, firearm, currency, and other evidence recovered during the search of Gastelum's residence. Accordingly, Gastelum's convictions for possession of heroin for sale, having proceeds from controlled substance offenses, and child endangerment must be reversed.⁷

If the District Attorney retries the case, the prosecution may not present in its case-in-chief any of the evidence recovered during the May 14, 2014 search of Gastelum's residence.

DISPOSITION

The judgment is reversed and the matter remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED.

CHANNEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.

⁷ Because we reverse the judgment on this basis, we need not address the other contentions Gastelum raises on appeal.