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IN THE
COURT OF APPEALS OF INDIANA

THADDEUS RODRIGUEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A05-1002-CR-69
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Mary R. Harper, Judge
Cause No. 64D05-0801-FB-912

August 3, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Thaddeus Rodriguez appeals his convictions for Class B felony burglary and Class A misdemeanor resisting law enforcement. We affirm.

Issues

Rodriguez raises two issues, which we restate as:

I. whether the factual basis supporting the search warrant was sufficient; and

II. whether the trial court properly denied his request for a continuance.

Facts

During the early morning hours of January 28, 2008, Cydney Austin decided to spend the night at a friend's house in the same neighborhood where she lived in Portage. When Austin went to her house around 2:00 a.m. to pick up some items for the night, nothing was out of place. At some point after she left, someone broke into Austin's house and stole her son's stereo. When Austin learned of the burglary later that morning, she called police. Austin told police that at approximately 4:00 a.m., Rodriguez, an acquaintance who also lived in the neighborhood, called her cell phone and at the same time knocked on the door at the house where Austin was staying. Police tracked footprints in the snow from Austin's house to Rodriguez's house.

Police knocked on Rodriguez's door and recognized Rodriguez as he looked out a window. When Rodriguez refused to open the door, the police sought a search warrant. The affidavit supporting the search warrant provided in part:

> On January 28, 2008, the Portage Police Department investigated a complaint of burglary involving Thaddeus Rodriguez. On January 28, 2008, this officer received a report, reference a complaint of burglary at 3290 Ashland Avenue, Portage, Indiana, wherein the suspect Thaddeus Rodriguez, left shoeprints with the heel portion having a broken chevron pattern where the point of the chevron points toward the toe. The toe portion has a pattern from the tip of the toe that angles down at a 45 degree angle, and the lower portion has a tread bar that crosses horizontally across the sole. Officers followed the shoe prints [sic] 5334 Boulder. Portage PD records indicate that this is the residence of Thaddeus Rodriguez and that Officer Greg Coleman of the Portage Police Department made visual contact with a Hispanic male subject. The victim Cydney L. Austin . . . stats [sic] that at approximately 0400 hrs on today's date she received a telephone call from Thaddeus Rodriguez. Ms. Austin stated she was at 3276 Brown St. when she received the call from Mr. Rodriguez. Ms. Austin advised that she looked out the window at the time of the call and observed Mr. Rodriguez standing outside the Brown St. residence talking to her on a cell phone. Mr. Rodriguez would have knowledge that Ms. Austin was not at her residence at 3290 Ashland Ave. Upon investigation it was determined that Thaddeus Rodriguez had damaged real property owned by Cydney Austin, entered the property at 3290 Ashland, and committed a burglary, to wit: entered the property at 3290 Ashland, and took a SONY MHC-GX99 stereo. This Officer believes, because she spoke of matters within her own personal knowledge and the information provided by them has been confirmed and corroborated by other evidence in this case. . . .
>
> Affiant I am seeking a search warrant to search the residence, a brown and red brick duplex which is the east residence of the duplex. There is present a white Ford Mustang and a white Honda in the front. The front yard is heavily littered with canine excrement at 5334 Boulder, Ave, Portage, Porter County Indiana for the proceeds of this crime described herein.

Ex. 14 (capitalization altered).

A search warrant was issued, and a SWAT team entered Rodriguez's house. Police could not find Rodriguez in the house but noticed a hole in the ceiling leading to the attic. Police eventually located Rodriguez hiding under a bed in the adjoining unit of the duplex, which he had accessed through the attic. Austin's son's stereo was recovered from Rodriguez's house.

On January 29, 2008, the State charged Rodriguez with Class B felony burglary and Class A misdemeanor resisting law enforcement. The State also eventually alleged that Rodriguez was an habitual offender. Rodriguez moved to suppress evidence obtained during the execution of the search warrant on the basis that the supporting affidavit was insufficient. The trial court denied the motion, and a jury was selected on Monday, January 5, 2009. After the jury was selected, the trial was adjourned until Wednesday, January 7, 2009.

At 11:30 a.m. on Tuesday, January 6, 2009, a detective from the Portage Police Department informed the deputy prosecutor that he had discovered phone calls Rodriguez made to Austin from jail on December 31, 2008. During the conversation between Rodriguez and Austin, Rodriguez urged Austin not to testify against him or to testify that she did not remember whether she had given him the stereo.

The deputy prosecutor listened to the recording of the phone calls and notified defense counsel of the calls at 1:00 p.m. Defense counsel was provided with copies of the recorded calls at 2:00 p.m. When the trial resumed the morning of January 6, 2009, defense counsel moved for a continuance and a mistrial, which the trial court denied. Defense counsel then objected to the foundation and authenticity of the recordings prior

to their admission. The objections were overruled, and a redacted version of the phone calls was admitted into evidence on January 8, 2009, at the conclusion of the State's case-in-chief. A jury found Rodriguez guilty as charged and found him to be an habitual offender. Rodriguez now appeals.[1]

Analysis

I. Search Warrant

Rodriguez argues that the factual basis supporting the search warrant is insufficient. In deciding whether to issue a search warrant, the issuing magistrate is tasked with making a practical, commonsense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Query v. State, 745 N.E.2d 769, 771 (Ind. 2001) (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). The reviewing court is to determine whether the magistrate had a "substantial basis" for concluding that probable cause existed. Id. (quoting Gates, 462 U.S. at 238-39, 103 S. Ct. at 2332). A substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. Id. For these purposes, "reviewing court" includes both the trial court ruling on a motion to suppress and an appellate court reviewing that decision. Id. We consider only evidence presented to the issuing magistrate, not post hoc justifications for the search. Id.

[1] Rodriguez sought and received permission to pursue a belated appeal in accordance with Indiana Post-Conviction Rule 2(3).

Rodriguez argues that the affidavit is insufficient because it does not describe when the footprints were made, when the last snow fall occurred, or whether there were other footprints in the area. Rodriguez also contends that the affidavit contains no information corroborating Austin's statement that Rodriguez called her at 4:00 a.m. or that Rodriguez was present at her friend's house at that time. Rodriguez points out that the affidavit contains conclusory statements and does not specifically link the shoes that made the print to him.

The State concedes that the affidavit "may not be the most thoroughly explicated probable cause affidavit ever drafted," but contends it is sufficient to support a finding of probable cause. Appellee's Br. p. 11. As the State asserts, the affidavit informed the magistrate that a stereo was stolen during a burglary, that Rodriguez knew Austin was not home that night, and that a distinctive set of footprints led from Austin's house to Rodriguez's house, where Rodriguez was seen inside. Although the affidavit did not link the shoes that made the prints directly to Rodriguez, the affidavit needed only to establish a fair probability that contraband or evidence of a crime would be found at Rodriguez's house. See Query, 745 N.E.2d at 771.

Focusing on the reasonable inferences drawn from the affidavit, we conclude that the magistrate had a substantial basis for concluding that evidence of a crime would be

found at Rodriguez's house. Rodriguez has not established that the trial court improperly admitted evidence discovered during the execution of the search warrant.[2]

II. Continuance

Rodriguez also argues that the trial court abused its discretion by denying his motion for a continuance to allow him time to defend against the admission of the recording of the phone conversation between Rodriguez and Austin in which Rodriguez urged Austin not to testify against him. "Rulings on non-statutory motions for continuance . . . lie within the discretion of the trial court and will be reversed only for an abuse of that discretion and resultant prejudice." Maxey v. State, 730 N.E.2d 158, 160 (Ind. 2000).

Rodriguez concedes that he initiated the phone call and that the evidence was turned over to defense counsel after jury selection "through no wrong of the State." Appellant's Br. p. 11. Rodriguez argues, however, that he was willing to waive his right to a speedy trial and defense counsel should have been given an opportunity to investigate the authenticity of the recording, re-evaluate strategy, determine the proper context of the conversation, and research the admissibility of the recordings.

Although Rodriguez clearly would have liked more time to prepare his defense, he has not established an abuse of discretion. First, the record shows that the deputy prosecutor informed defense counsel of the recordings almost immediately after she was made aware of them. Further the recordings were not discovered until after a jury had

[2] Because of this conclusion, we need not address the State's arguments that the officers relied on the search warrant in good faith or that the admission of evidence discovered during the execution of the search warrant was harmless error.

been selected, and they were not admitted into evidence until the conclusion of the State's case-in-chief, giving defense counsel an opportunity to assess their content and admissibility. Moreover, it was Rodriguez himself who initiated the conversation with Austin and urged her not to testify against him. He has not established that the trial court abused its discretion in denying his motion for a continuance.

Conclusion

The factual basis supporting the search warrant was sufficient, and Rodriguez has not established that the trial court abused its discretion in denying his request for a continuance. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.