

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

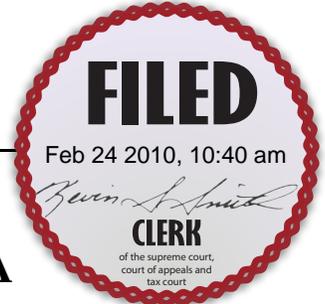
ATTORNEY FOR APPELLANT:

GARY L. GRINER
Mishawaka, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

MATEO CRUZ,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 20A04-0907-CR-377

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0706-FA-26

February 24, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Mateo Cruz (Cruz), appeals his convictions for dealing in methamphetamine, a Class A felony, Ind. Code § 35-48-4-1.1(a)(2)(C) & (b)(1); possession of a controlled substance, a Class D felony, I.C. § 35-48-4-7(a); and, possession of a sawed-off shotgun, a Class D felony, I.C. § 35-47-5-4.1(a)(6).

We affirm.

ISSUE

Cruz raises one issue for our review, which we restate as: Whether the trial court abused its discretion by admitting as evidence items seized during the execution of a search warrant.

FACTS AND PROCEDURAL HISTORY

On June 19, 2007, police officers from the Elkhart County Interdiction and Covert Enforcement Unit (ICE Unit) received a tip from a cooperating source identified (CS) and another individual who was a friend of the cooperating source (Friend). CS and Friend indicated that they had observed a large amount of marijuana, methamphetamine, and cocaine at 501 James Place in Goshen, Indiana. Captain Wade Branson (Captain Branson) of the Goshen Police Department drove CS and Friend to the residence so they could purchase drugs. After twenty minutes, they exited the residence and were again interviewed by Captain Branson and another officer. CS stated that she saw plastic bags of marijuana on the kitchen table and observed a Hispanic male place a handgun in the kitchen cabinet. Friend corroborated that information and added that she saw a Hispanic male put two handguns in

the kitchen cabinet and was also advised by Cruz, and another Hispanic man that goes by the street name of Chango, not to bring anyone to the residence anymore, and if she wanted to purchase drugs, someone would deliver them.

Based on the information he received from CS and her Friend, the next day, Captain Branson submitted a probable cause affidavit and obtained a search warrant for 501 James Place. The probable cause affidavit stated that on March 11, 2006, Officer Elva Yoder (Officer Yoder) from the Goshen Police Department located a juvenile female that had been reported as a runaway. She advised Officer Yoder that she had been with an individual named Gregorio Vargas on several occasions when he purchased marijuana and cocaine at one particular residence—501 James Place in Goshen, Indiana. On March 13, 2006, Officer Yoder stopped a vehicle for a traffic infraction that he observed leaving 501 James Place. The driver of the vehicle was Cruz. Officer Yoder asked Cruz for consent to search his person and the vehicle. Cruz consented, and Officer Yoder located rolling papers in the console and \$558.00 in his pocket. Officer Yoder later learned that the water and sewer utilities at 501 James Place were in Cruz's name. Additionally, on May 30, 2006, the ICE Unit received information from officials in Texas that Cruz, along with other individuals, had been arrested when police officers located a kilogram of cocaine in the trunk of a car they occupied. Cruz was released on his own recognizance.

The affidavit also stated that the CS had assisted the ICE Unit and the Cass County Michigan Drug Unit in the recent past and that her information had been found to be “accurate and reliable” which led to two successful search warrants and arrest of “two

individuals on narcotics related charges and narcotics purchases” (Appellant’s App. Vol. I, p. 47). The Friend advised Captain Branson that she had been to 501 James Place three weeks prior and had observed handguns, methamphetamine, cocaine, and a large amount of marijuana in a trash bag that one of the occupants had brought up from the basement of the residence. She was able to identify the drugs based on her prior use and experience. She stated that she knew three of the five Hispanic males at the residence, including Cruz, and she believed that Cruz lived at the residence. She also stated that all three were gang members and that she had observed Chango selling drugs in the past.

On June 20, 2007, with the assistance of the Goshen Emergency Response Team (ERT), ICE Unit officers executed the search warrant at 501 James Place. The police apprehended Cruz and five other individuals and searched the premises. Police found, among other things, a Glock 30 handgun inside a kitchen cabinet along with ammunition, a clear plastic baggie with white powdery substance, empty clear plastic baggies, over \$32,000 in cash throughout the house, marijuana, a copy of the magazine High Times, trash bags containing green plant-like substances, drug paraphernalia, vials with clear liquids, Cruz’s social security card, and a water bill and traffic ticket in his name. Later laboratory testing determined that the white substance found in the baggie was methamphetamine and the clear liquid in the vials contained anabolic steroids.

On June 25, 2007, the State filed an Information, charging Cruz with Count I, dealing in methamphetamine, a Class A felony, Ind. Code § 35-48-4-1.1(a)(2)(C) & (b)(1); Count II, possession of a controlled substance, a Class D felony, I.C. § 35-48-4-7(a); Count III,

possession of a handgun with obliterated identification, a Class C felony, I.C. § 35-47-2-18(2); and Count IV, possession of a sawed-off shotgun, a Class D felony, I.C. § 35-47-5-4.1(a)(6).

On September 27, 2007, Cruz filed a motion to suppress evidence obtained from the search of the residence on the basis that the search warrant was not supported by probable cause. On October 16, 2008, the trial court denied his motion to suppress. A jury trial was held on May 4, 2009. During the trial, Cruz objected to the introduction of evidence at trial. The trial court overruled his objection. After the second day of trial, the jury returned a guilty verdict on Count I, dealing in methamphetamine, a Class A felony; Count II, possession of a controlled substance, a Class D felony; and Count IV, dealing in a sawed-off shotgun, a Class D felony. He was found not guilty on all remaining charges. Cruz was sentenced to 45 years for Count I and concurrent terms of one and one-half years on Count II and IV to be served in the Indiana Department of Correction.

Cruz now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

The admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of discretion. *Redding v. State*, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006), *reh'g denied*. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.*

II. *Search Warrant*

A. *Admission of Evidence*

Cruz contends that the trial court abused its discretion when it admitted evidence found during the search of his residence. Specifically, he argues that the search warrant was invalid because it was “not based upon probable cause [].” (Appellant’s Br. p. 6).

In deciding whether to issue a search warrant, “[t]he task of the issuing magistrate is simply to make a practical, common sense 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.” *Jagers v. State*, 687 N.E.2d 180, 181 (Ind. 1997) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983), *reh’g denied* 463 U.S. 1237 (1983)). If a defendant questions the validity of a search warrant, the trial court’s duty is to determine whether a “substantial basis” existed to support the issuing judge’s finding of probable cause. *Snover v. State*, 837 N.E.2d 1042, 1048 (Ind. Ct. App. 2005) (quoting *Gates*, 462 U.S. at 238-39). “Substantial basis requires the reviewing court, with significant deference to the [judge]’s determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination’ of probable cause.” *Id.* (quoting *Houser v. State*, 678 N.E.2d 95, 99 (Ind. 1997)). A “reviewing court” for these purposes includes both the trial court ruling on a motion to suppress and an appellate court reviewing that decision. *Houser*, 678 N.E.2d at 98. Although we review *de novo* the trial court’s substantial basis determination, we nonetheless afford “significant deference to the magistrate’s

determination” as we focus on whether inferences drawn from the totality of the evidence support that determination. *Id.* at 98-99.

The Fourth Amendment to the United States Constitution and Art. 1, Section 11 of the Indiana Constitution, which contains language nearly identical to the Fourth Amendment, protects citizens from unreasonable searches and seizures, and requires that searches be supported by probable cause. *Jackson v. State*, 908 N.E.2d 1140, 1143 (Ind. Ct. App. 2009). Probable cause is “a fluid concept incapable of precise definition . . . [that] is to be decided based on the facts of each case.” *Snover*, 837 N.E.2d at 1048 (Ind. Ct. App. 2005) (quoting *Figert v. State*, 686 N.E.2d 827, 830 (Ind. 1997)). “Probable cause to search premises is established when a sufficient basis of fact exists to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime.” *Id.* (quoting *Esquerdo v. State*, 640 N.E.2d 1023, 1029 (Ind. 1994)).

Where a warrant is sought based on hearsay information, I.C. § 35-33-5-2(b)(1) and (2) requires that the affidavit must either:

- (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or
- (2) contain information that establishes that the totality of the circumstances corroborates the hearsay.

“[U]ncorroborated hearsay from a source whose credibility is itself unknown, standing alone, cannot support a finding of probable cause to issue a search warrant.” *Jaggers*, 687 N.E.2d at 182. The trustworthiness of hearsay for the purpose of proving probable cause can be established in a number of ways, including where: (1) the informant has given correct

information in the past, (2) independent police investigation corroborates the informant's statements, (3) some basis for the informant's knowledge is demonstrated, or (4) the informant predicts conduct or activity by the suspect that is not ordinarily easily predicted. *Id.* Other considerations may come into play in establishing the reliability of the informant or the hearsay. *Hayworth v. State*, 904 N.E.2d 684, 695 (Ind. Ct. App. 2009).

Cruz claims that the information relied upon in the affidavit was unreliable; specifically that Friend was not known to be reliable. We note that there is no evidence in the record to support the proposition that Friend had given police reliable information in the past or had been known to be reliable. Additionally, during the suppression hearing, Captain Branson acknowledged that Friend's credibility had not been established and admitted that Friend had "not been known to be a reliable informant." (Suppression Hearing, p. 8).

The information provided by Friend, standing alone, would not have been enough to issue a search warrant. *See Jagers*, 687 N.E.2d at 182. However, in this case, the information provided by Friend was corroborated by CS, who had been found to be a reliable source in the past. After CS and Friend exited the house, they were interviewed separately by police. The affidavit stated that CS had:

observed two clear plastic bags containing what [she] knew from prior use and experience to be marijuana on the kitchen table. [CS] believed that the weight of the marijuana was approximately two ounces. [CS] also advised that [she] observed one of the Hispanic males place a handgun in a kitchen cabinet behind some food while in the kitchen of the residence.

(Appellant's App. Vol. I, p. 47). This information was confirmed by Friend, who stated that she had "observed marijuana in the kitchen and advised that [she] observed one of the

Hispanic males place two handguns in the kitchen cabinet.” (Appellant’s App. Vol. I, p. 47). In addition to the information provided by CS and Friend, police received information from the runaway juvenile in March of 2006 that drugs had been purchased from 501 James Place. In addition, based on independent investigation, police stopped Cruz for a valid traffic violation close to his residence, and while he was not arrested, noted that he was in possession of rolling paper and a large sum of cash. Police later found that the water and sewer utilities at the residence were in Cruz’s name. During surveillance of Cruz’s residence, police noted that at least one of the vehicles in the driveway had been registered to individuals with previous narcotics arrest.

Under the totality of the circumstances described above, the information known to Captain Branson would lead a reasonably prudent person to believe that evidence of possession of and/or dealing in illegal substances would be uncovered at Cruz’s residence. Accordingly, we conclude that the search warrant was supported by probable cause, and, therefore, the trial court did not abuse its discretion by admitting the evidence discovered during the execution of the search warrant.

B. *Overbroad Search Warrant*

As an additional argument, Cruz also argues that the search warrant was invalid because it was overly broad. In particular, he argues that the search warrant allowed police to essentially search everyone and everything “on the property for any evidence of drugs or drug activity.” (Appellant’s Br. p. 6).

Indiana code section 35-33-5-2 governs affidavits used to obtain search warrants and provides in pertinent part:

- (a) Except as provided in section 8 of this chapter, no warrant for search or arrest shall be issued until there is filed with a judge an affidavit:
 - (1) particularity describing:
 - (A) the house or place to be searched and the things to be searched for;
or
 - (B) particularly describing the person to be arrested;
 - (2) alleging substantially the offense in relation thereto and that the affiant believes and has good cause to believe that:
 - (A) the things as are to be searched for are there concealed; or
 - (B) the person to be arrested committed the offense; and
 - (3) setting forth the facts then in knowledge of the affiant or information based on hearsay, constituting probable cause.

See also U.S. CONST. AMEND. IV; Ind. Const. Art. 1, § 11. A warrant that leaves the executing officer with discretion is invalid. *Levenduski v. State*, 876 N.E.2d 798, 802 (Ind. Ct. App. 2007). While general warrants are prohibited by the Fourth Amendment, a police officer may seize evidence not identified in a warrant “when he inadvertently discovers items of readily apparent criminality while rightfully occupying a particular location.” *Allen v. State*, 798 N.E.2d 490, 499 (Ind. Ct. App. 2003); *Eaton v. State*, 889 N.E.2d 297, 300 (Ind. 2008).

In this case, the search warrant authorized police to search 501 James Place in Goshen, Indiana, including “any buildings, structures, or vehicles references therein, and also including fenced-in areas, and/or any closed containers anywhere within the described premises [.]” (Appellant’s App. Vol. I, p. 49). Based on all the previous information they

learned about the residence and those occupying it, police had reason to believe that they would find:

Marijuana, Cocaine or other controlled substances in any form; baggies or other types of containers containing such substances or residue thereof; scales for the weighing of such substances; paraphernalia used in the ingestion or consumption of such substances; money; buy money; guns; ammunition and; records or ledgers of dealing in such substances; and any other indicia of the use, consumption, preparation, and/or dealing of such controlled substances; and evidence of domain; []

(Appellant's App. Vol. I, p. 49). First, that to the extent that Cruz argues that the search warrant was overboard, we note that our supreme court has established that a search warrant for a single residence authorizes a search of the curtilage of the residence, including the yard and outbuildings. *Sowers v. State*, 724 N.E.2d 588, 590 (Ind. 2000).

Second, the language of the search warrant was not general nor did it leave discretion to police, as it was limited to the nature of the activity under investigation—illicit drugs. It also allowed officers to look in places that drugs may be concealed. *See United States v. Ross*, 456 U.S. 798, 821 (1982) (“a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found.”).

Based on the information gathered from independent police investigation, the affidavit linked Cruz to 501 James Place. In addition, information provided by the confidential informants gave police officers enough probable cause that there was illegal activity occurring inside of the house. The search warrant described the exact items that they

believed to be in the house. Thus, we cannot say that the search warrant was overboard and lacked particularity.

CONCLUSION

Based on the foregoing, we find the trial court did not abuse its discretion when it admitted items seized during the execution of a search warrant because there was probable cause and the language of the search warrant met the particularity requirement of the Fourth Amendment.

Affirmed.

VAIDIK, J., and CRONE, J., concur.