Circuit Court for Talbot County
Case No. C-20-CR-19-209

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 001

September Term, 2020

STATE OF MARYLAND

v.

TYRON GREEN

Meredith,
Wells,
Eyler, Deborah A.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Wells, J.

Filed: July 31, 2020

The State appeals from an order of the Circuit Court for Talbot County which suppressed a quantity of crack cocaine the police seized from a motel room in which appellee, Tyron Green, was staying. The seizure occurred pursuant to a search warrant. The probable cause statement in the warrant, among other things, described an illegal drug transaction that a confidential informant conducted with Green, who, at that time, happened to be staying in an adjacent room within the motel complex. The transaction occurred days before the warrant was executed and was witnessed by the police officer-affiant.

The sole issue presented is whether the court's decision to exclude the drugs was correct. We conclude that it was not, reverse the suppression order, and remand to the circuit court for further proceedings.

BACKGROUND

A. The Search Warrant

In his application for the search warrant at issue here, the affiant, Detective Christopher Westerfield of the Easton Police Department's Narcotics Unit, stated that on April 4, 2019, he met with a confidential informant (hereafter, "the CI") with whom Det. Westerfield had previously worked. The detective also found the CI to be reliable and trustworthy. The purpose of the meeting was to arrange for the CI to buy crack cocaine from Tyron Green. The police suspected Green was the source of a year-long series of complaints of illegal drug activity occurring within the town of Easton.

At Det. Westerfield's direction, the CI arranged to meet Green at an Econo Lodge

on an unspecified date in April 2019. Det. Westerfield gave the CI marked currency to use in the transaction. As Det. Westerfield watched from another location, the CI drove to the Econo Lodge and met with Green. During the meeting, Green left the CI, went to room 221, returned, and met again, briefly, with the CI. Afterward, the CI drove away and immediately met Det. Westerfield at the surveillance location. There, the CI handed the detective a napkin containing three pieces of a substance that the CI had just purchased from Green. The substance tested positive for cocaine. Det. Westerfield sought two separate warrants, one to search Green's person, and the other, his motel room.

The application and warrant for the motel room comprise eleven typed pages. The first page of the application states that the place to be searched is, "8175 Ocean Gateway Room 222 (Econo Lodge) Easton, Maryland 21601." In the application, Det. Westerfield also states that on April 18, 2019, he met with the manager of the Econo Lodge to confirm that Green was still staying there. From information the manager provided, the detective discovered that Green had moved from room 221 to room 222 two days before. Det. Westerfield included that information on page 5 of the statement of probable cause. For unexplained reasons, although "room 222," was printed in various places in the warrant, in two places on page five only, "room number 221" was printed instead. At those two places, Det. Westerfield changed the printed number, "221," to read "222," and initialed the change. A judge signed the warrant on April 18, 2019.

With the warrant in hand, the police searched room 222, where Green was, in fact,

staying. There, police discovered a quantity of crack cocaine. Green was subsequently arrested and charged with possession with intent to distribute cocaine and related charges.

B. The Suppression Hearing

Before trial, at a separate hearing, Green moved to suppress the crack cocaine. At the hearing, the State called Jayesh Desai, the manager of the Econo Lodge. He confirmed that during April 2019, Green was a guest of the motel and last stayed there on April 19, 2019. The court also admitted into evidence the Econo Lodge's guest roster, showing the rooms in which Green stayed during the month of April.

Det. Westerfield testified along the same lines as has been discussed, namely, that he engaged the CI to purchase cocaine from Green using marked money that the police supplied. Det. Westerfield confirmed that he observed the transaction between the CI and Green. The detective acknowledged that Green had gone into room 221 to get the drugs to complete the sale, but, by the time the detective had obtained the search warrant, Green had moved next door, to room 222. Nonetheless, the detective felt he had probable cause to search there. On cross-examination, the detective admitted that he never witnessed Green go into or come out of room 222. He admitted he had altered the room number on two places in the application by changing the last digit from a 1 to a 2.

Before the suppression court, Green's counsel argued that the police lacked probable cause to search room 222. Green's counsel asserted that if the police wanted probable cause to search there, they could have conducted a controlled buy while Green was staying in that room. The State argued, that a suspect like Green could defeat

probable cause by moving frequently to different rooms within the motel complex because the rooms were rented daily. The prosecutor argued that the State had met its burden of describing the place to be searched, namely, the room in which Green was staying at the time the warrant was sought. And, although the prosecutor did not explicitly say so, he argued the good faith exception to the exclusionary rule applied because the judge issued the warrant believing probable cause existed and the police executed it in good faith.

Immediately after counsels' arguments, the suppression court orally ruled that the police had probable cause to search room 221, but not room 222, and granted Green's motion to suppress. The State filed this timely appeal.

Additional facts may be introduced as needed.

DISCUSSION

A. The Parties' Contentions

Before this Court, the State argues that the suppression court failed to use the substantial basis test, which the State maintains is the proper standard of review for determining whether the issuing judge properly found probable cause to sign the search warrant. Instead, in the State's view, the suppression court reviewed the warrant and substituted its own judgment of whether probable cause existed. Had the suppression court used the more deferential standard of review, the State argues, then the court would have found that the issuing judge properly found probable cause. The State argues that the substantial basis test "does not require that objects sought are in a given location, nor

does [the substantial basis test] require an averment that criminal acts occurred in the location to be searched." The State, quoting *Holmes v. State*, 368 Md. 506, 522 (2002), asserts that the suppression court need only have found that there was "a nexus between the objects to be seized and the place to be searched from which a person of reasonable caution would believe the objects sought might be found there," as the warrant's application and affidavit met that standard.

Further, the State argues that even if the search warrant's probable cause basis was deficient, the good faith exception to the exclusionary rule would apply here.[1] The State maintains the police acted objectively in good faith in relying on the warrant. Thus, in the State's view, the court should not have suppressed the drugs seized.

Green takes the opposite view. He argues that both probable cause and good faith are absent. Green asserts that although the suppression court judge never uttered the words "substantial basis test," the judge clearly understood that he was reviewing the

[1] *United States v. Leon*, 468 U.S. 897 (1984), and its companion case, *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), established the good faith exception to the exclusionary rule. Under the good faith doctrine, "evidence seized under a warrant subsequently determined to be invalid may be admissible if the executing officers acted in objective good faith with reasonable reliance on the warrant." *McDonald v. State*, 347 Md. 452, 467 (1997), *cert. denied*, 522 U.S. 1151 (1998). *Leon* set out four sets of circumstances under which suppression remains the appropriate remedy: (1) when the judicial officer issuing the warrant was misled by an affidavit that "the affiant knew was false or would have known was false except for his reckless disregard of the truth;" (2) when the magistrate "wholly abandoned his judicial role;" (3) when "a warrant [is] based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;'" or (4) when the warrant is facially deficient (e.g., failing to particularize the place to be searched). *Minor v. State*, 334 Md. 707, 713, (1994).

issuing judge's probable cause determination, since he referenced the issuing judge by name several times. Further, the suppression court correctly determined that the warrant lacked probable cause as Det. Westerfield plainly testified that during the drug transaction Green went to room 221 to get the cocaine. Green also points out that Det. Westerfield never disclosed exactly when the drug transaction occurred. Green notes that Det. Westerfield did not reveal the date at the suppression hearing, nor did he state the date of the transaction in the warrant's statement of probable cause. In Green's view, that omission means that the time between the drug transaction and the time the detective drafted the search warrant could have been a matter of "weeks," imperiling the "freshness" of probable cause.

Additionally, Green argues that the State's reliance on *Holmes* is misplaced. There, the police obtained warrants to search a house, not a motel room, as here. *Holmes*, 368 Md. at 509-10. More importantly, according to Green, "there was no nexus between the drug transaction involving Room 221 on an unknown date in April and Room 222, to which [Green] was registered on April 18th." Additionally, Green posits that the State's reliance on *State v Coley*, 145 Md. App. 502 (2002), is misplaced in that this Court declined to adopt as a rule that probable cause may be established in knowing that drug dealers will likely keep contraband in their homes. Finally, Green asserts that the good faith exception cannot apply here because no reasonable officer would have believed there was probable cause to search Room 222.

The State and Green argue the applicability of the good faith exception to the facts

here. Although we have the discretion to address this issue, based on our holding on the issue of probable cause, we decline to do so.[2]

B. Analysis

The Fourth Amendment to the United States Constitution commands that, "No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Constitution, amend. IV.[3] The Fourteenth Amendment makes the Fourth Amendment's warrant restrictions applicable to the states. *Garcia-Perlera*, 197 Md. App. at 552-53 (*citing Waters v. State*, 320 Md. 52, 56-57 (1990); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Frey v. State*, 3 Md. App. 38, 46 (1968)).

In the context of search warrants, probable cause has been defined as a "fair

[2] In his concurring opinion in *Illinois v. Gates*, 462 U.S. 213, 264–65 (1983) (White, J., concurring), Justice White indicated that, in a case where the issue is simply whether the facts support a finding of probable cause as opposed to the "novel" case that requires resolution to guide future actions of law enforcement officers and magistrates, "it would be prudent for the reviewing court to immediately turn to the question of whether the officers acted in good faith." This, too, would seem to be a case in which the issue is simply whether the particular facts presented support a finding of probable cause. As noted in *McDonald v. State*, 347 Md. 452, 470, n. 10 (1997), *cert. denied*, 522 U.S. 1151 (1998), the ultimate question of good faith is a legal issue (citing *United States v. Williams*, 3 F.3d 69, 71 n. 2 (3rd Cir.1993)). The standard is objective, not subjective, good faith, and where there is an adequate record, the good faith inquiry may appropriately be made for the first time on appeal. *McDonald*, 347 Md. at 470, n. 10 (citing *United States v. Sager*, 743 F.2d 1261, 1265 (8th Cir.1984), *cert. denied*, 469 U.S. 1217 (1985) and *United States v. Hendricks*, 743 F.2d 653, 656 (9th Cir.1984)).

[3] The same constitutional rights are provided to Marylanders in Article 26 of the Maryland Declaration of Rights

probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "Probable cause is a nontechnical conception of a reasonable ground for belief that the items sought will be found in the premises searched. Probable cause involves practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Agurs v. State*, 415 Md. 62, 75-76 (2010). In determining whether probable cause exists, the issuing judge or a magistrate is confined to the averments contained within the four corners of the search warrant application. Review of the magistrate's decision to issue a search warrant is limited to whether there was a substantial basis for concluding that the evidence sought would be discovered in the place described in the application and its affidavit. *Coley*, 145 Md. App. at 520–21 (*quoting State v. Lee*, 330 Md. 320, 326 (1993) (citations omitted).

"The task of the warrant-issuing magistrate is 'simply to make a practical, common sense decision' whether probable cause exists." *Coley,* 145 Md. App. at 519 (quoting *Birchhead v. State*, 317 Md. 691, 701 (1989); *Gates*, 462 U.S. at 235. "Therefore, any court that reviews a magistrate's determination of probable cause does so under the 'substantial basis' standard." *Id.* (*citing State v. Amerman,* 84 Md. App. 461, 472-73 (1990). "Finally, we stress that, 'although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.'" *Id.* (*quoting United States v. Ventresca*, 380 U.S. 102, 109 (1965); *citing Jones v. United States*, 362 U.S. 257 (1960)).

In *Coley*, we said that "[t]he substantial basis standard involves 'something less than finding the existence of probable cause,' and 'is less demanding than even the familiar clearly erroneous standard by which appellate courts review judicial fact finding in a trial setting.'" *Id*. at 145 Md. App. at 521. And, the Supreme Court has explained that one of the strong reasons for extending "great deference" to the magistrate's decision to issue a warrant is to encourage the police to submit to the warrant process:

> A grudging or negative attitude by reviewing courts toward warrants, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrant[s] by interpreting affidavit[s] in a hyper-technical, rather than a commonsense, manner.

Amerman, 84 Md. App. at 470 (quoting *Gates*, 462 U.S. at 236). Finally, *Gates* stresses that the inquiry is not whether the reviewing court would find probable cause but whether the magistrate had a substantial basis for doing so:

> Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a 'substantial basis for ... conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.

Gates, 462 U.S. at 236.

The holdings in *Coley* and *Holmes* guide our analysis. As is the case here, both *Coley* and *Holmes* concerned the question of the nexus between the item seized and the place the police wanted to search. Specifically, the inquiry is whether "a neutral magistrate – the issuing judge – [could] reasonably infer from [the] observations [made in

the warrant affidavit] that drugs and other evidence of controlled dangerous substance violations [were] likely to be found in [a particular place.]" *Coley*, 145 Md. App. at 524 (quoting *Holmes*, 368 Md. at 519).

Holmes was convicted of a variety of drug-related offenses, including possession with intent to distribute cocaine. *Id*. at 508. On the day he was arrested, Holmes was in the company of Brian Covell, who was under police surveillance himself. Id. at 508. The police had a warrant to search Covell's residence and car. *Id*. The police stopped Holmes and Covell while they were in the Holmes' car. *Id*. at 510. At that time, a police officer noticed a plastic bag that he suspected contained marijuana protruding from Holmes' pocket and he was arrested. *Id*. Holmes, Covell, and the police then went to Holmes' house. Once there, Holmes' father consented to a search of the house where the police found a safe. *Id*. The police later obtained a search warrant for the safe and in it found cocaine and drug paraphernalia. *Id*. at 511.

In its analysis of the nexus issue, the Court of Appeals looked to *Mills v. State*, 278 Md. 262 (1976) and *State v. Ward*, 350 Md. 372 (1998), two cases that involved search warrants for weapons.

> *Mills* and *Ward* approached the nexus issue in terms of pure deductive reasoning: a particular kind of weapon was used in the crime; there was evidence linking the defendant to the crime; the weapon was of a kind likely to be kept, and not disposed of, by the defendant; when arrested shortly after the crime, the defendant was not in direct possession of the weapon; ergo, it was likely to be found in a place accessible to him—his home or car. That same kind of deductive approach, based on reasonable factual assumptions, has been used by a number of courts in finding a nexus between observed or documented drug transactions and the likelihood that drugs or other evidence of drug law violations may be found in the

> defendant's car or home. The reasoning, supported by both experience and logic, is that, if a person is dealing in drugs, he or she is likely to have a stash of the product, along with records and other evidence incidental to the business, that those items have to be kept somewhere, that if not found on the person of the defendant, they are likely to be found in a place that is readily accessible to the defendant but not to others, and that the defendant's home is such a place.
>
> Direct evidence that contraband exists in the home is not required for a search warrant; rather, probable cause may be inferred from the type of crime, the nature of the items sought, the opportunity for concealment, and reasonable inferences about where the defendant may hide the incriminating items. The thrust of [the aforementioned cited] decisions was characterized in [*United States v.] Thomas*, [300 U.S. App. D.C. 380, 989 F.2d 1252, 1255 (D.C.Cir.1993),] in a unanimous per curiam opinion by a panel that included now Supreme Court Justice Ruth Bader Ginsburg, that "observations of illegal activity occurring away from the suspect's residence, can support a finding of probable cause to issue a search warrant for the residence, if there is a reasonable basis to infer from the nature of the illegal activity observed, that relevant evidence will be found in the residence."

Holmes, 368 Md. at 521-22.

Coley concerned the suppression of drugs found at Coley's residence after the police conducted a search there pursuant to a warrant. Coley was arrested and charged with a variety of drug-related offenses, including possession with intent to distribute cocaine, among other charges. *Id*. at 511. Coley moved to suppress the drugs seized. At the end of the suppression hearing, at the judge's insistence, the officer who drafted the warrant sat listening as the judge read aloud the officer's probable cause narrative. As he read, the judge commented on whether the officer had established probable cause at different junctures in the investigation. *Id*. at 512-16. Ultimately, the suppression court concluded that the police had not established probable cause to search Coley's residence.

Id. at 516.

This Court reversed. Our review of the record established that the suppression court engaged in a de novo review of probable cause. We stated that the suppression court's "responsibility, however, was not to assess to its satisfaction the existence of probable cause, but, rather, to determine if the issuing magistrate's decision was supported by substantial evidence. In making that determination, the magistrate's decision is to be afforded great deference." *Id*. at 521 (citing *Birchead v. State*, 317 Md. 691, 701 (1989)).

We determined that that the issuing judge, in fact, had a substantial basis for issuing the warrant after analyzing the decision in *Holmes*. We opined that the controlled drug transaction that formed a basis for the warrant, need not have occurred in Coley's residence. Rather, the police "needed only to show a reasonable basis to infer from the nature of the illegal activity that evidence of a crime would be found in Coley's residence." 145 Md. App. at 527(citing *Holmes*, 368 Md. at 522–523). We discussed six other "problems" the suppression court had with the warrant's averments, such as the fact that the controlled buys did not occur at Coley's residence. We determined that the other circumstances showed that "a reasonable person could infer that the drugs later sold to the CI were kept at the residence prior to sale." 145 Md. at 528-29.

Here, our review of the hearing transcript suggests, despite what Green argues, that the suppression court engaged in an independent review of probable cause, rather than employ the substantial basis standard of review. In the twenty-six lines of hearing

transcription that comprise the suppression court's ruling, it is apparent that the court's focus was on whether there was probable cause to search the specific room in which Green was staying, not on whether the issuing judge had a substantial basis to sign the warrant. We reiterate what Judge Moylan, writing for this Court in *Amerman*, explained about probable cause and the role of a suppression judge when reviewing a search warrant.

> Probable cause does not suddenly spring to life at some fixed point along the probability continuum. It may arise at any number of points within a band of not insignificant width. Within that range of legitimate possibilities, the determination is as much an art form as a mathematical exercise and relies necessarily upon the eye of the beholder. One judge may give a circumstance great weight; another may give it slight weight; each is entitled to weigh for himself and neither will be legally wrong in so doing. Within proper limits, one judge may choose to draw a reasonable inference; another may as readily decline the inference; each will be correct and each is entitled, therefore, to the endorsement of a reviewing colleague. A permitted inference, after all, is not a compelled inference.
>
> Under the circumstances, it is perfectly logical and not at all unexpected that a suppression hearing judge might say, "I myself would not find probable cause from these circumstances; but that is immaterial. I cannot say that the warrant-issuing judge who did find probable cause from them lacked a substantial basis to do so; and that is material." There is a Voltairean echo, "I may disagree with what you decide but I will defend with my ruling your right to decide it."

Amerman, 84 Md. App. at 473. Having determined that the suppression court did not use the appropriate deferential standard, we now review to determine whether the issuing magistrate had a "substantial basis" to issue the warrant for room 222 of the Easton Econo Lodge.

We first note that while *Holmes* and *Coley* dealt with searches of residences, the

same analysis applies to the search of Green's motel room. Just as *Holmes* and *Coley* opined that a controlled drug buy need not have occurred in either Holmes' or Coley's residences to provide probable cause to search there, similar circumstances of illegal drug activity here also support the reasonable inference that evidence of Green's criminal activity could be found where he was staying. *Holmes*, 368 Md. at 522-23; *Coley*, 145 Md. App. at 527. The police long suspected Green of criminal activity. According to Det. Westerfield's statement of probable cause, "during the years of 2018 and 2019," Green was the subject of "numerous complaints by civilians" of "distributing cocaine throughout the town of Easton." The warrant application reveals that it was the CI who confirmed that Green was selling crack cocaine. It was the CI who arranged to meet Green at the Econo Lodge to conduct a controlled buy of the drug. The sale transpired at the Econo Lodge, as planned. And, the drugs recovered were, in fact, cocaine. Consequently, it is reasonable to infer from the information disclosed in the warrant application that Green was probably engaged in drug selling at the Easton Econo Lodge during April 2019.

We think Green's concern about the staleness of the warrant is unfounded. While it is disconcerting that Det. Westerfield did not mention exactly when the controlled drug sale occurred, from the sequence of events detailed in the warrant, one can readily deduce that the transaction occurred sometime between April 4, 2019, the date the detective first met with the CI, and April 16, 2019, the date that the manager of the Econo Lodge said Green moved from room 221 to room 222, or a period of twelve days, at the most. There

are no specific criteria to determine the staleness of probable cause to issue a warrant, "[t]he ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason." *Greenstreet v. State*, 392 Md. 652, 674 (2006) (quoting *Andersen v. State*, 24 Md. App. 128, 172 (1975)). Where, as here, the alleged illegal activity spans a period of time the issue of staleness is not acute. "Where the affidavit in a case 'recites facts indicating activity of a protracted and continuous nature, or a course of conduct, the passage of time becomes less significant, so as not to vitiate the warrant.'" *Greenstreet*, 392 Md. at 974-75 (citations omitted). We conclude that the ongoing nature of the illegal activity made it unlikely that Green had suddenly stopped selling crack cocaine or moved his operation between the 12-day span found here.

More importantly, the inquiry is not whether a drug sale happened in room 221, but whether there was probable cause to believe that the police could find evidence of Green's drug selling in room 222.[4] For the purposes of a substantial basis review, it is reasonable to infer that Green was using whatever room he occupied at the motel from which to sell drugs. Several facts make this inference reasonable. First, from page 6 of the warrant application, we learn that Green had a residence at 11 Jowite Street in Easton.

[4] Reading the entire search warrant, it seems that Det. Westerfield sought to search room 222 all along. For whatever reason, use of an earlier draft or merely a typographical error, "221" was typed in two places in the application, both of which appear on page 5. In the application and in the warrant, the number "222" is printed throughout. The record supports the following sequence of events, all of which occurred on April 18, 2019: the detective went to the Econo Lodge, confirmed Green was there, but in room 222, drafted the warrant, and then presented it to a judge who sign it at 4:28 p.m.

Second, as discussed, the controlled drug sale described in the warrant indicates that Green chose to conduct his illegal drug activities from a motel instead.

Third, it would be reasonable to infer that Green would not have left contraband behind when he changed motel rooms but taken it with him to the next room he occupied. Had he left contraband behind for someone else, such as the cleaning staff or another guest to find, Green ran the risk that management, and, ultimately, the police would discover that he was selling crack cocaine from the motel. Det. Westerfield stated in the warrant application that based on his training and experience, that he had "become familiar with many of the methods employed by drug dealers and abusers to further their illegal acts and conceal their activities from law enforcement." Having witnessed a direct sale of crack cocaine to the CI days before at the Econo Lodge, Det. Westerfield believed it probable that Green would have taken any contraband with him when he changed motel rooms.

Consequently, to paraphrase *Coley*'s holding, we believe that it can be reasonably inferred that the affidavit, taken as a whole, supports the inference that evidence of Green's illegal activity could be found in room 222. We conclude that the crack cocaine seized in this case should not have been suppressed.

THE ORDER OF THE SUPPRESSION COURT IS REVERSED AND THE CASE REMANDED TO THE CIRCUIT COURT FOR TALBOT COUNTY FOR FURTHER PROCEEDINGS. APPELLEE TO PAY THE COSTS.