

Circuit Court for Baltimore County
Case No. 03K08004063

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2439

September Term, 2016

RUSSELL PAUL DOBASH, SR.

v.

STATE OF MARYLAND

Woodward, C.J.,
Nazarian,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed:

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Russell Dobash, Sr. was convicted of second-degree burglary in the Circuit Court for Baltimore County, after a bench trial on an agreed statement of facts. Before trial, he had moved to suppress evidence discovered at his home on the ground that the affidavit in support of the warrant application did not support a finding of probable cause to search his home. The trial court denied the motion. Mr. Dobash appeals his conviction, and we affirm.

I. BACKGROUND

This case grows out of a burglary at a bar and restaurant called the Tempo Lounge in Essex, where Mr. Dobash was a former employee and had a key. On August 11-12, 2008, someone broke into the Lounge and stole cartons of cigarettes. The police investigated and, based on the following affidavit by Corporal Shane Hanley, obtained a warrant to search Mr. Dobash's car and residence:

On 8/12/2008 Officer Johnson was dispatched to 402 Back River Neck Road, Baltimore, Maryland 21221 for a Second Degree Burglary at the Tempo Lounge. The burglary occurred between 8/11/2008 11:15 pm and 8/12/2008 at 9:00 am. Officer Johnson was met by the owner of the Tempo Lounge Ruth Holt who advised several cartons of cigarettes were removed from her business. Entry was gained by using a key to the side door to the business. Once inside the business, which is a pit beef stand, a hole was punched through the wall into the adjacent business, a liquor store. A large refrigerator had been moved in the pit beef stand to gain access to the wall that led to the liquor store. Once inside the liquor store several items of property were removed totaling \$1,587.00. The following property was removed from the business: U.S currency in various denominations totaling \$200.00[;] (5) Marlboro Cigarette Cartons[;] (4) Marlboro 100 Cigarette Cartons[;] (3) Salem Cigarette Cartons[;] Carmel Light Cigarette Carton[;] Carlton Menthol 100's Cigarette Carton[;] Virginia Slim Lights Cigarette Carton[;] Marlboro Menthol Lights Cigarette Carton[;] Kool Cigarette Carton[;] Marlboro Menthol Cigarette Carton[.]

Officer Johnson interviewed two employees at the location. Interviewee Barbara Knell advised she locked and secured all doors to the business on 8/11/2008 at 11:15 pm. There were no suspicious subjects seen in the area when the business was closed. Interviewee Kevin Smith opened the business on 8/12/2008 at 9:00 am and found the business to be secure. All doors were found to be locked and no signs of forced entry were observed to the exterior of the building. Upon entry to the building interviewee Smith observed a hole in the back wall of the pit beef stand leading into the liquor store. A large refrigerator had been moved in the pit beef stand to gain access to the wall. The only door leading into the pit beef stand is a side door which showed no signs of forced entry. Ms. Holt advised only two people had keys to that door. One of those individuals is Russell Paul Dobash (M/W, 11/26/1958) who is a former employee of the Tempo Lounge. A second employee Richard Quata also had a key to the pit beef stand. Ms. Holt advised she suspected Russell Dobash as being responsible for the burglary because she recently fired him. Ms. Holt knew a key had to be used to gain entry because the door was locked when interviewee Smith arrived at the location on 8/12/2008 at 9:00 am. The door can only be locked with a key from either the inside or the outside.

Ms. Holt advised a delivery driver for U.S foods, who delivers food to her business, advised he witnessed someone selling cigarettes at the Middle River Inn located at 2230 Old Eastern Avenue, Baltimore, Maryland 21220 in the parking lot to various people. Ms. Holt provided the name of John Starkey who works for U.S foods. He had previously delivered food to the Tempo Lounge on 8/12/2008 and had learned about the burglary through Ms. Holt prior to making his delivery at the Middle River Lounge. Corporal Hanley contacted John Starkey after being provided a phone number by U.S foods for John Starkey. John Starkey advised the following: On 8/12/2008 he had made a food delivery to the Tempo Lounge and was advised of the burglary by Ms. Holt and the property removed from the location including numerous cartons of cigarettes. A short time later at around 3:00 pm on 8/12/[2]008 he was finished a delivery at the Middle River Inn and was sitting in the parking lot when he observed a white male exit a white four door vehicle bearing Maryland Registration

4DGE77. Mr. Starkey advised the hood of the vehicle had an ornament on it. The white male is described as 45-50 years old, with dark hair that is slightly graying. The white male was average height wearing blue jeans and white T-shirt. A second person was seen exiting the vehicle with the male. She is described as a white female with blonde hair. Mr. Starkey advised he observed an unknown individual approach the white male at his vehicle and the white male was selling cartons of cigarettes. Numerous individuals began approaching this white male and he continued to sell cartons of cigarettes pulling them out of his vehicle. It is unknown exactly how many cartons of cigarettes were sold. Mr. Starkey did not approach the white male or speak to him. Mr. Starkey then contacted Ms. Holt and advised him what he had witnessed at the Middle River Inn on the parking lot. Ms. Holt advised the vehicle and person described by John Starkey matched the description of Russell Dobash and the vehicle belonged to him.

A check through MVA showed a 1995 Oldsmobile bearing Maryland registration 4DGE77 listed to a Russell Paul Dobash Sr. and a Barbara Dawn Dobash who reside at 2025 Middleborough Road, Baltimore, Maryland 21221. Ms. Holt furthered provided the address of 2025 Middleborough Road, Baltimore, Maryland 21221 as the address where Russell Dobash Sr. resides.

Your affiants know through their training, knowledge, and experience that persons who possess stolen property will store same usually at their place of residence until they believe same is no longer readily identifiable and will then sell same in a clandestine manner or will convert same to their own personal use or give same as gifts to family members or friends.

The police executed the warrant and found stolen cigarettes at Mr. Dobash's residence. As the case proceeded toward trial, he moved to suppress the evidence discovered at his home on the ground that the affidavit in support of the warrant application did not support a finding of probable cause to search there. The court denied the motion,

and after reserving his right to appeal the court's suppression decision, Mr. Dobash proceeded to trial before the same court on the following statement of facts:

[O]n August 12th of 2008, the Tempo Lounge, located here in Baltimore County on Back River Neck Road, was broken into. The detectives from the burglary unit responded once the burglary was reported. What they found was there was no forced entry into the location. In fact, when the first employee came to open up the business on August 12th, he had no idea that anything had happened. The entire building was secured and locked. However, once going inside, the employee did find a hole in the wall that [led] from the pit beef stand into the liquor store area of the location. They did determine that there was a refrigerator that was on that wall where the fridge was. There was a hole made in the wall. An entry was made into the liquor store area itself and there were numerous cartons of cigarettes stolen. The approximate value was \$1587 in cigarettes, and also some cash stolen.

Once the detectives spoke to the other employees, the owner, a Miss Holt, indicated that she suspected Russell Dobash. The reason she thought he was involved is because he was a current employee who would work around the business and do odd jobs. He did have a key to the location. He was one of only two individuals who had keys, the other being Miss Holt herself and another employee who is working for three years in good standing.

Based on that information, [] the detectives did take up an investigation. Additionally, there was a driver, Mr. John Starkey, who is present in the Court, he was a delivery driver and he delivered some merchandise to the business just after the burglary was found. He was notified of what happened and he left the business and went around the neighborhood to do the other deliveries and several hours later he observed an unusual situation. He observed two individuals selling what appeared to be cartons of cigarettes out of the back of their car. He was able to identify [Mr. Dobash]'s wife, Barbara Dobash, as the female who was selling cigarettes, however he was not able to identify the male. Based on all of the information, the detectives did get a search and seizure warrant signed by Judge

Jung of the District Court and it was executed on the Defendant's home that he shared with Barbara Dobash.

Once they arrived, they did make entry, did find several cartons of cigarettes inside of the home. The approximate value was \$253.40. Miss Holt from the Tempo Lounge did later identify those cigarettes as being consistent with the ones stolen from her business.

At that time [Mr. Dobash]'s wife gave a written statement as to her involvement and this Defendant's involvement. She indicated that [Mr. Dobash], the night of the burglary or early morning hours had come home with several cartons of cigarettes for them to sell and she did admit that they went to that local parking lot and were selling cigarettes out of the back of the car. She indicated that just after the key [sic] to the Tempo Lounge and told her to keep it on her key ring and get rid of it. The key was returned back to Mrs. Holt and she did positively identify that key as the one belonging to the business. At no time did [Mr. Dobash] nor anyone else have permission to enter the location and steal those items. In terms of [Mr. Dobash], he was lawfully arrested and was interviewed by the police after waiving Miranda. He stated that he gave a story saying that some guy had given him four to five cigarettes, carton of cigarettes; he indicated that he knew that they were stolen. Additionally, further investigation in terms of conversation with Miss Holt did reveal that [Mr. Dobash] was not fired from the Tempo Lounge, that in fact he was supposed to work the night that the burglary was found. He never came to the location and never called in and told them why he did not show up for work. Your Honor, that would be the evidence that the State would present if the case had gone to trial.

The trial court found Mr. Dobash guilty of second-degree burglary. Trial counsel did not note a timely appeal, but Mr. Dobash sought and was granted the opportunity to file a belated appeal.

II. DISCUSSION

Mr. Dobash presents us a single question: “Did the lower court err in denying the motion to suppress?” He contends that “the warrant makes out probable cause to search the car. But the only mention of the house is, and by the way, we want to search the house too.” Thus, he asserts, the search of his home was illegal, and the evidence acquired at his residence must be suppressed. The State counters that the issuing judge had a substantial basis to issue the search warrant and it was appropriate for the trial court to deny the motion to suppress. Moreover, the State argues, even if the issuing judge did err in granting the warrant, the evidence should not be suppressed because the police relied on the warrant in good faith.

When reviewing the decision of another judge to issue a search and seizure warrant based on probable cause, “the reviewing judge sits in an appellate-like capacity with all of the attendant appellate constraints,” *State v. Amerman*, 84 Md. App. 461, 463 (1990), whether at the trial or appellate level. “Under those ‘attendant appellate constraints,’ the suppression hearing judge may well be called upon to uphold the warrant-issuing judge for having had a substantial basis for issuing a warrant even if the suppression hearing judge himself would not have found probable cause from the same set of circumstances.” *State v. Johnson*, 208 Md. App. 573, 578 (2012). This is because we prefer, and encourage, the police to get warrants rather than searching without them, and we “will uphold a warrant even should the warrant-issuing judge have been technically wrong in the assessment of probable cause.” *Id.* at 579. The question for a reviewing judge, at the trial or appellate level, is not whether there was probable cause that evidence would be found in the house

to be searched, but “whether the judge who issued the search warrant had a ‘substantial basis’” for finding probable cause and thus issuing the warrant. *Id.* at 581. And a “substantial basis is less weighty and less logically probative than probable cause.” *Id.* at 586–87.

A. The Affidavit Provided A Substantial Basis For The Issuing Judge To Issue A Warrant To Search Mr. Dobash’s Home.

The trial court correctly denied the motion to suppress the evidence found at Mr. Dobash’s home. The court pointed to the section of the application that states “in our experience and with our expertise we know that people who have stolen goods from recent burglaries often store them in their house. Therefore, we want a warrant for the house, Judge,” and observed that the issuing judge “agreed and gave them a warrant. I mean, that – isn’t that the same as the probable cause of the detective having the expertise in certain narcotics situations and – can you give me a case that says that that is insufficient?” We agree with the trial judge’s analysis.

We agree with Mr. Dobash that an officer cannot assert probable cause to search a home simply by claiming that burglars or thieves often hide stolen goods in their residences. But when combined with other case-specific facts, the officers’ “training, knowledge, and experience” can bridge the gap between, as here, evidence known to be present in a suspect’s vehicle and the likelihood that other contraband may be present elsewhere. *See Johnson*, 208 Md. App. at 583; *State v. Edwards*, 266 Md. 515, 525 (1972); *State v. Faulkner*, 190 Md. App. 37, 49–51 (2010); *Holmes v. State*, 368 Md. 506 (2002). Nor is it necessary that officers provide direct evidence linking criminal acts to a suspect’s

home so long as the evidence allows a reasonable inference to that effect. *Holmes*, 368 Md. at 522 (“Direct evidence that contraband exists in the home is not required [to issue] [the] 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.”); *Faulkner*, 190 Md. App. at 52 (warrant is justified when officers can create “a nexus between the suspect’s criminal actions and the suspect’s home sufficient to support a reasonable inference that the tools or fruits of the crime probably will be found at his home.”).

In this case, we agree that the warrant affidavit provided a substantial basis for a finding of probable cause that evidence from the Tempo Lounge robbery might be found in Mr. Dobash’s home. The affidavit cited statements by two individuals who identified Mr. Dobash or his vehicle as the one involved in the cigarette carton sales, and a search of MVA records confirmed that Mr. Dobash’s car matched the description of the car from which the cigarettes were sold. The MVA records identified Mr. Dobash’s residence, and the spoils of the break-in, cartons of cigarettes, are bulky and need to be kept somewhere. The affidavit detailed how “persons who possess stolen property will store same usually at their place of residence until they believe same is no longer readily identifiable and will then sell same in a clandestine manner or will convert same to their own personal use or give same as gifts to family members or friends.” The court could well have inferred too that implements used to punch through the wall between the pit beef stand and the liquor store could also be discovered in Mr. Dobash’s home, and thus that “tools [] of the crime”

might also be found there. *Faulkner*, 190 Md. App. at 52. On this record, the trial court appropriately denied Mr. Dobash’s motion to suppress, and we affirm the conviction.

B. In Any Event, The Police Relied In Good Faith On The Warrant.

Even if, however, the issuing judge had lacked a substantial basis to find probable cause and to issue the warrant, we agree with the State that the evidence still should not have been suppressed.

Under the good faith exception to the Fourth Amendment’s exclusionary rule, evidence obtained pursuant to a search warrant, later determined or assumed to have been issued improperly, should not be suppressed unless the officers submitting the warrant application were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

Marshall v. State, 415 Md. 399, 408 (2010) (cleaned up). There are four situations in which suppression is 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).

State v. Coley, 145 Md. App. 502, 522 n.13 (2002) (citing *United States v. Leon*, 468 U.S. 897 (1984)). None of these deficiencies is present here. There is no allegation that the affidavit was false or misleading or facially deficient, or that the issuing court failed to

perform its gatekeeper function properly. Mr. Dobash challenges the warrant’s substantive sufficiency, not the good faith of the officers in seeking or executing it.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED.
APPELLANT TO PAY COSTS.**