UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2751

September Term, 2014

ALBERT WAYNE GROSS

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: December 21, 2015

Albert Wayne Gross, appellant, was convicted on a not guilty agreed statement of facts in the Circuit Court for Anne Arundel County of possession of heroin and subsequently sentenced to a year and a day imprisonment. Appellant asks one question on appeal: Did the affidavit in support of the search warrant for appellant's residence contain insufficient facts to sustain a probable cause determination? For the following reasons, we shall affirm the circuit court's judgment.

SUPPRESSION HEARING LAW

When reviewing the denial of a motion to suppress, the record at the suppression hearing is the exclusive source of facts for our review. *State v. Rucker*, 374 Md. 199, 207 (2003)(citations omitted). We extend great deference to the fact finding of the suppression judge and accept the facts as found, unless clearly erroneous. *Carter v. State*, 367 Md. 447, 457 (2002)(citations omitted). In addition, we review the evidence in the light most favorable to the prevailing party, in this case, the State. *Cartnail v. State*, 359 Md. 272, 282 (2000)(citations omitted). Nevertheless, this Court must make its own independent constitutional appraisal by reviewing the law and applying it to the facts of the case. *Id*. at 282-83 (citing *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996)).

SUPPRESSION HEARING FACTS

Prior to trial, appellant moved to suppress the heroin found in his apartment pursuant to a search warrant executed by the police. No testimony was taken at the suppression hearing but the search warrant and affidavit in support of the warrant were admitted into evidence.

The affidavit and accompanying warrant application, dated May 14, 2014, was submitted by Detectives Eric Newton and Joseph Mann, both of the Annapolis Police Department. Both detectives' work history and training were attached to the warrant application and stated that Newton had more than ten years of experience with the police department and Detective Mann had more than five years of experience. The affidavit they submitted, stated, in pertinent part:

> Between the dates of May 1st and May 14th, Det. Newton and I [Detective Mann] met with a confidential information (hereafter referred to as CI) at a predetermined location. The CI stated that there was a lot of drug activity occurring in the Timothy House apartment building (29 West Washington Street) and that he/she was familiar with a subject who was dealing out of apartment #402. The CI identified the drug dealer who was dealing out of this apartment as "AJ". The CI stated that he/she would be able to purchase CDS out of this apartment from "AJ". I am familiar with a subject who goes by the name "AJ" as William Aaron Teat through prior arrest. The CI was shown a picture of William Aaron Teat and he/she identified him as the drug dealer he/she [knew] as "AJ".
>
> The CI was searched for any illegal monies or contraband, and was found to be free of both. The CI was then given an amount of police funds. The CI was under visual surveillance while he/she was en route to the Timothy House apartment building.
>
> The CI entered the Timothy House apartment building as directed by William Teat. A short time later, the CI was observed leaving the area of the Timothy House complex. Det. Newton and I again met with the CI at a predetermined location. The CI then handed me a clear plastic bag containing suspected CDS. Due to my training, knowledge and experience, I recognized this substance to be suspected CDS. The CI was again searched for illegal contraband and monies. The CI was found to be free of both.
>
> The CI then advised Det. Newton and I, that he/she entered the Timothy House apartment building and went up to apartment #402. The CI

> stated that he/she entered apartment #402 and met with "AJ". The CI stated that he was able to purchase an amount of CDS from "AJ". The CI then exited apartment #402.
>
> The CDS that was turned over to me was field tested using a NIK field test kit. The test proved positive for the presence of CDS. The CDS was properly packaged and placed into APD property as evidence.

The affidavit also stated that Detective Mann had reviewed an "updated tenant roster for the Timothy House Apartment Complex" and that the last known lease holder for Apartment 402 was Booker T. Williams. Detective Mann added that he reviewed police records and learned that William Teat had been arrested for possession with intent to distribute, possession of CDS, burglary, and weapons possession.

During argument, defense counsel challenged the sufficiency of the affidavit, arguing that it contained insufficient facts to sustain a probable cause determination. He argued that the affidavit lacked any information as to the confidential informant's credibility, and the control buy lacked sufficient controls to make it reliable. Specifically, he argued that the police failed to observe the confidential informant entering and exiting the apartment building or Apartment 402. The State responded that the absence of information in the affidavit as to the confidential informant's credibility was made up for by the "typical[ness]" of the control buy. After hearing the parties' arguments, the suppression court denied appellant's motion, finding that the affidavit contained sufficient probable cause to uphold the search warrant.

The case proceeded to trial by way of an agreed statement of facts. The State related that around 1:00 a.m., on May 15, 2014, the Annapolis Police Department executed a search warrant for 29 West Washington Street, Apartment 402. They found only one person in the apartment, appellant, who stated that he was the only person on the lease. During a search of the apartment, the police found a substance, later determined to be heroin, wrapped inside a piece of paper. Based on those facts, the court found appellant guilty of possession of heroin.

DISCUSSION

Appellant argues that the motions court erred in denying his motion to suppress the heroin found in his apartment because the affidavit in support of the warrant lacked probable cause. Appellant concedes that sufficiently controlled drug buys can in themselves establish probable cause for a search warrant where a confidential informant's veracity or basis of knowledge is not shown. Appellant argues, however, that the controlled buy at issue lacked sufficient controls. The State counters that the controlled buy was sufficiently controlled and met the substantial basis standard for finding probable cause. Although we believe this is a close case, we agree with the State.

The Fourth Amendment, applicable to the States through the Fourteenth Amendment, states 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[.]" *Birchead v. State*, 317 Md. 691, 700 (1989)(quotation marks omitted)(citing

Mapp v. Ohio, 367 U.S. 643 (1961)). In determining whether probable cause exists to support the issuance of a warrant, the issuing court is confined to the statements contained in the search warrant application. *West v. State*, 137 Md. App. 314, 322 (citations omitted), *cert. denied*, 364 Md. 536 (2001). The issuing court's task is "simply to make a practical, common-sense decision whether probable cause exists[.]" *Birchead*, 317 Md. at 701 (quotation marks and citations omitted).

We have stated the standard by which we review an issuing court's determination of probable cause:

> When reviewing the judge's decision to issue a search warrant, we do not undertake a *de novo* review, but, instead, pay great deference to the magistrate's determination. *West*, 137 Md. App. at 322, 768 A.2d 150. Extending great deference to the magistrate's decision acts as a means of encouraging the police to submit to the warrant process. *State v. Amerman*, 84 Md. App. 461, 469, 581 A.2d 19 (1990). "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 warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." *West*, 137 Md. App. at 322, 768 A.2d 150 (quoting *Gates*, 462 U.S. [213] at 236, 103 S.Ct. 2317 [(1983)]) (citations and internal quotation omitted). Furthermore, in cases wherein it is not easy to determine whether the 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.'" *Holmes v. State*, 368 Md. 506, 520, 796 A.2d 90 (2002)(quoting *Mills v. State*, 278 Md. 262, 280, 363 A.2d 491 (1976)).
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> "Reflecting a 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 concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *West*, 137 Md. App. at 322, 768 A.2d 150 (citing *Gates*,

> 462 U.S. at 236, 103 S.Ct. 2317). The substantial basis standard, which is less demanding than the clearly erroneous standard, operates under the "totality of circumstances" approach, wherein an excess of evidence as to one aspect of proof may make up for a deficit as to another. *Amerman*, 84 Md. App. at 472-73, 581 A.2d 19.

Ferguson v. State, 157 Md. App. 580, 592-93 (2004). A "substantial basis" standard has also been described as involving "something less than finding the existence of probable cause[.]" *State v. Coley*, 145 Md. App. 502, 521 (2002)(quotation marks and citations omitted).

It has long been settled that "[s]o long as the controls are adequate, the 'controlled buy' alone may well establish probable cause to search a suspect premises, let alone verify from scratch an informant's otherwise unestablished 'credibility.'" *Hignut v. State*, 17 Md. App. 399, 412 (1973). "If [] the controls are adequate in a 'controlled buy' exercise, the credibility of the controlled buyer is utterly immaterial." *State v. Jenkins*, 178 Md. App. 156, 178 (2008).

Appellant argues that the controlled buy in his case was not sufficiently controlled. Appellant points out that the affidavit states that the confidential informant was under surveillance while "en route" to the apartment building, but the affidavit is unclear whether the confidential informant walked to the apartment building or drove a vehicle to the building. If the latter occurred, the affidavit did not mention searching the vehicle and appellant posits that the confidential informant could have acquired contraband from inside the vehicle. Second, appellant points out that Apartment 402 was one of an unspecified

number of apartments in the Timothy House Apartment Complex. Appellant argues that there were at least four apartments in the complex given that the confidential informant allegedly went into Apartment 402, and the police never saw the confidential informant enter Apartment 402 once he/she entered the apartment complex. Lastly, appellant points out that the affidavit states that the confidential informant was observed leaving "the area of the Timothy House complex," which suggests that the police did not see the confidential informant leave the apartment building. In sum, appellant argues that the controlled buy was not even a "minimally" controlled buy because the State failed to use "a reliable informant; a body wire; marked currency; prior surveillance; multiple buys; or constant visual surveillance of the building." We agree that the controls used here were minimal, but we are ultimately persuaded that the controls were sufficient to support the search warrant.

There is no requirement that the police observe the entire controlled buy. *See Hignut*, 17 Md. App. at 413 ("[I]ndependent observation need only verify a significant part, and not the totality, of an informant's story[.]"). Here, the affiant searched the confidential informant before the controlled buy and he/she was found to be free of money or contraband. The confidential informant was then given departmental money and was under surveillance while "en route to the Timothy House apartment building." We agree that the language is ambiguous but note that we are to resolve "possibly ambiguous language with an eye toward upholding the warrant rather than toward striking it down." *Jenkins*, 178 Md.

App. at 182 (quotation marks and citation omitted). Once at the building, the affidavit states that the confidential informant was directed into the apartment building by Teat.

At this point, the confidential informant's actions are not verified, so we do not know whether the confidential informant went to Apartment 402 or some other apartment, but this does not end our analysis. Several other jurisdictions have found sufficient probable cause in the search warrant affidavit where the police fail to verify the reliability of the confidential informant and the confidential informant is sent into an apartment building to make a controlled buy without police surveillance. *Cf. United States v. Cook*, 949 F.2d 289 (10th Cir. 1991)(an unobserved controlled buy in an apartment in an apartment building sufficient to establish probable cause for warrant); *Commonwealth v. Warren*, 635 N.E.2d 240, 242 (Mass. 1994)(warrant affidavit contained sufficient probable cause where controlled buy occurred unobserved by police in an apartment where the building contained three apartments); *State v. Sherlock*, 768 P.2d 1290 (HI 1989)(where a confidential informant completed a controlled buy by going into an apartment building where he was unobserved and returned with drugs, affidavit contained sufficient facts to sustain a probable cause determination); *State v. Cavegn*, 356 N.W.2d 671 (MN 1984)(sufficient probable cause where confidential informant went into an apartment building and made a controlled buy, where the apartment was one of several in the building).

The affidavit here states that a short time after entering the building, the confidential informant was observed leaving "the area" of the apartment building. We agree with

appellant that the language is again ambiguous for "the area" could include everything from the door of the building to a distance of a block away or more. As stated above, however, where the language is ambiguous, we should look with an eye toward upholding the warrant.

We agree that the information provided in the affidavit could have been clearer and more controls could have been put in place. We believe the lack of controls are not fatal, however, because of the additional information provided in the affidavit. Information available to the police other than through the informant may adequately corroborate the informant's story. *See Jenkins*, 178 Md. App. at 183.

Here, the police bolstered their minimally controlled, controlled buy with information that the person whom the confidential informant identified as selling drugs from the apartment, Teat, had a prior drug history. Additionally, Teat was observed by the police at the door of the building and directing the confidential informant inside. While still only on the barest of margins, we are persuaded that, under the circumstances presented, the issuing judge had a substantial basis to conclude that the warrant was supported by probable cause.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.