

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 1576

STATE OF LOUISIANA

VERSUS

KENNETH DWAYNE JONES

Judgment Rendered: February 13, 2009

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Number 601919

Honorable Ernest G. Drake, Jr., Presiding

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Defendant/Appellant
Kenneth Dwayne Jones

BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

GUIDRY, J.

Defendant was charged in a single bill of information with possession with intent to distribute marijuana, in violation of La. R. S. 40:966A(1), (Count I), possession with intent to distribute cocaine, in violation of La. R. S. 40:967A(1), (Count II) and possession of a firearm by a convicted felon, in violation of La. R.S. 14:95.1 (Count III). The state declined to prosecute the firearms charge. Following a jury trial, the defendant was convicted as charged on Count I, and he was convicted of the responsive offense of possession of cocaine on Count II. La. R.S. 40:967C. The court imposed a sentence of twenty years at hard labor for the conviction of possession with intent to distribute marijuana, with credit for time served, and a consecutive term of five years at hard labor for the conviction of possession of cocaine. Defendant filed a motion to reconsider sentence, which was denied. He now appeals, alleging six assignments of error:

1. The court erred in denying defendant's motion to suppress.
2. The court abridged defendant's due process rights by personally vouching for the confidential informant.
3. The court denied defendant due process by refusing to disclose the identity of the confidential informant.
4. The state failed to comply with specific discovery requests.
5. The court erred by not granting defendant a mistrial.
6. The sentences are excessive.

Finding no merit to these assignments of error, we affirm defendant's convictions and sentences.

FACTS

Defendant was arrested on February 3, 2006, after officers executing a search warrant for his residence found approximately six pounds of marijuana in the master bedroom closet and another pound of marijuana in a kitchen cabinet. The officers also found approximately seven grams of crack cocaine in a pocket of defendant's pants. A digital scale and a number of small plastic bags were found with the marijuana in the kitchen.

The affidavit supporting the search warrant claimed that a confidential informant had been inside the house within the preceding forty-eight hours and had seen a large quantity of cocaine and weapons. The warrant was executed around 6:00 a.m. as a “no-knock” warrant because of the allegations of weapons inside the residence. When asked if there were any drugs or guns on the premises, defendant led the officers to a closet in the master bedroom. Two bags containing about six pounds of marijuana in bulk form were hidden under a teddy bear. Defendant claimed full responsibility for the marijuana and told the officers his wife, Danisha Moore Jones, knew nothing about it.

Defendant and Danisha were asleep in the master bedroom, and defendant was wearing boxer shorts when the officers arrived. Defendant asked permission to get dressed and pointed out a pair of pants on the bedroom floor. The pants were searched, and defendant’s identification and the cocaine were found in the pockets. The remaining marijuana was found in a kitchen cabinet, along with the scales and plastic bags.

Danisha Jones testified she and defendant were separated at the time of the search, and he was living with his mother elsewhere. Danisha stated that she owned the searched residence, but that she rarely stayed at that residence and primarily stayed at her mother’s house because it was closer to her job. Danisha also stated that several of her adult relatives and their children were living at the searched premises, and that the residence was being used for storage by relatives whose homes had been damaged by Hurricane Katrina. According to Danisha, the defendant was in the residence that morning because he had been injured in an automobile accident the day before while driving her car. She brought him home from the hospital around 10:00 p.m. and let him stay the night so they could take care of incidental business involving the wreck the next day.

ASSIGNMENT OF ERROR NUMBER ONE

In defendant's first assignment of error, he claims the court erred by refusing to suppress the drugs found in the house because the search warrant was based on an affidavit containing intentional misrepresentations. Defendant alleges the warrant was both sought and executed in bad faith. He further contends the affidavit did not contain the facts establishing the existence of probable cause within its four corners because there was no independent corroboration of the information received from the informant.

Defendant filed three separate motions to suppress, claiming 1) his statement should be suppressed because it was not free and voluntary, 2) physical evidence should be suppressed because he was arrested without probable cause and without a warrant, and 3) the identification process was suggestive. After a hearing on the motions to suppress physical evidence and the statement, the court took the motions under advisement and subsequently issued written reasons for judgment denying the motions. After defendant retained new counsel, another motion to suppress alleging thirty-six general claims was filed and denied.

Justin Moran, a narcotics agent with the Tangipahoa Parish Sheriff's Office, and Chad Scott, a veteran agent of the U. S. Drug Enforcement Agency, testified at the hearing on defendant's motions to suppress and at trial. Moran was the case agent, and he obtained a warrant after learning that a confidential informant had been inside defendant's residence and had seen a quantity of cocaine and weapons. The warrant was obtained shortly thereafter and was executed early the next morning. During the trial, defense counsel cross-examined Moran about his attempts to verify the information provided by the informant, and Moran disclosed for the first time that the confidential informant actually had purchased cocaine from the defendant the day before the search. This disclosure is the focus of most of defendant's assignments of error.

Defendant claims the warrant submitted by Moran was based on half-truths and untruths because the affidavit did not indicate the informant bought cocaine from defendant and thus was obtained and executed in bad faith. Defendant alleges Moran admitted he intentionally misrepresented facts in the warrant application.

An affidavit is presumed to be valid, and the defendant has the burden of showing by a preponderance of the evidence that the affidavit contains false statements. State v. Brannon, 414 So. 2d 335, 337 (La. 1982). When a defendant proves the affidavit contains false statements, it should be determined whether the misrepresentations are intentional or unintentional, and the burden again is on the defendant to prove by a preponderance of the evidence that the misrepresentations in the affidavit are intentional. State v. Kreitz, 560 So. 2d 510, 512 (La. App. 1st Cir.), writ denied, 565 So.2d 940 (La. 1990). The making of material and intentional misrepresentations to a magistrate is considered a fraud on the courts and will invalidate the warrant, and the items seized pursuant to the warrant will be suppressed. State v. Byrd, 568 So. 2d 554, 559 (La. 1990). “Intentional” in this context means a deliberate act designed to deceive the issuing magistrate. State v. Lamartiniere, 362 So. 2d 526, 529 n.2 (La. 1978).

Moran testified he drafted the affidavit to indicate the informant merely observed a transaction in order to protect the identity of his informant, since defendant let only a few people inside his residence. He acknowledged it would have bolstered the affidavit to include information about the controlled purchase of cocaine by the informant, but he contended he believed he had enough probable cause to secure the warrant without the additional allegation.

Information possessed by the affiant, but not disclosed to the issuing magistrate for his consideration, cannot be used to rehabilitate an otherwise insufficient affidavit. State v. Koncir, 367 So. 2d 365, 367 n.1 (La. 1979). However, since defendant was charged only with intent to distribute and was not

charged with a distribution offense, the information about the controlled purchase was not necessary to establish probable cause. It is not necessary that an affidavit recite every thing seen during surveillance, but only what is required to support the conclusion of probable cause. State v. Vincent, 439 So. 2d 1124, 1126 (La. App. 4th Cir. 1983), writ denied, 472 So. 2d 913 (La. 1985). Herein, the state did not solicit the information; it was disclosed as a result of defense cross-examination. The decision to protect the identity of the confidential informant by omitting the information about the controlled purchase clearly was not done to deceive the magistrate into issuing a warrant where no probable cause existed. Defendant has not alleged the information is false because a sale did not take place, but only that the affiant did not reveal as much as he could have about the events the informant saw. Accordingly, defendant's claim the affidavit was obtained in bad faith is without merit.

Defendant also claims the affidavit was defective because information establishing the credibility of the informant was not contained within the four corners of the affidavit. He claims the mere assertion in the affidavit that the informant was reliable was not sufficient to establish the informant's credibility.

In State v. Horton, 01-2529, p. 6 (La. 6/21/02), 820 So.2d 556, 560, the Louisiana Supreme Court articulated the responsibilities for the magistrate presented with a warrant request:

A magistrate must be given enough information to make an independent judgment that probable cause exists to issue a warrant. *See, e.g., State v. Manso*, 449 So.2d 480, 482 (La.1984), *cert. denied, Manso v. Louisiana*, 469 U.S. 835, 105 S.Ct. 129, 83 L.Ed.2d 70 (1984). The United States Supreme Court held that “[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.” *United States v. Leon*, 468 U.S. 897, 915, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (citations omitted). Moreover, this Court previously held: “[t]he process [of determining probable cause] simply requires that *enough information be presented to the issuing magistrate to enable him to determine that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal justice system.*” *State v. Rodrigue*,

437 So.2d 830, 833 (La.1983) (citing *Jaben v. United States*, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345 (1965)) [emphasis original].

Defendant argues this affidavit contained merely a “bare bones” assertion regarding the reliability of the confidential informant with no basis for the conclusion of reliability. He further contends the warrant does not contain independent corroboration of the information to buttress the assertion of trustworthiness.

The affidavit includes the following allegations:

Within the past forty eight hours, a reliable confidential informant entered the above stated residence and spoke to the occupant known as B/M Kenneth Jones. While inside this residence the informant observed a large quantity of purported crack cocaine. This informant also observed a narcotics transaction while inside the residence.

The informant is knowledgeable and can readily recognize purported crack cocaine and its paraphernalia.

This informant has provided information in the past and has been utilized during investigations by the Tangipahoa Parish Narcotics Division.

Tangipahoa Parish Narcotic Division has received several complaints within the past several weeks concerning narcotics trafficking activities at this residence.

There are no specific tests to be satisfied by an informant's tip; the magistrate may issue the warrant when the totality of the circumstances, viewed in a commonsense and non-technical manner, establish there is a fair possibility that contraband or evidence of a crime will be found in a particular place. State v. Barrilleaux, 620 So. 2d 1317, 1320 (La. 1993) (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)). The lack of further corroboration by surveillance does not invalidate warrants when other details support a reasonable inference of reliability. State v. Hernandez, 513 So. 2d 312, 316 (La. App. 4th Cir.), writ denied, 516 So. 2d 130 (La. 1987). See also State v. Johnson, 404 So. 2d 239, 244 (La. 1981), cert. denied sub nom., Kelly v. Louisiana, 456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982).

The warrant was based on information from an individual who claimed to have been inside defendant's residence within the preceding forty-eight hours and to have seen contraband there. The affidavit also recites the informant had provided information in the past and had been used in narcotics investigations. Although the affidavit does not state the information had led to arrests and convictions, such a statement is not a prerequisite to a finding of reliability. See State v. Clay, 408 So. 2d 1295, 1299 (La. 1982). Accordingly, this assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER TWO

In defendant's second assignment of error, he claims the court denied him due process by personally vouching for the informant's veracity. Defendant claims the court abandoned its role as a neutral arbiter and participated in the state's failure to disclose the controlled narcotics transaction. He alleges Judge Drake "vacillated" about disclosing the name of the confidential informant, and by interviewing the informant, the judge "intertwined himself in the case to such an extent that it impacted Mr. Jones' right to a fair trial before an unbiased tribunal."

The minutes reflect defendant requested the name of the confidential informant in October 2006. Although a ruling on his request is not in the record, during the hearing on defendant's motion to suppress the state asked the court to reconsider its ruling granting disclosure of the identity, claiming defendant had failed to establish this was an exceptional case warranting disclosure. The court indicated it had ordered the name released "assuming there wasn't any big problem" and agreed to reconsider the ruling during the suppression hearing after the circumstances had been made clear.

The suppression hearing was conducted on February 27, 2007, and after taking the matter under advisement the court issued written reasons for judgment

denying the motion on March 21, 2007. The court revoked its order granting disclosure in the written ruling on the motions to suppress.

The minute entry of March 28, 2007, reflects defense counsel asked the court to interview the informant, and the court subsequently conducted the interview. Thereafter, the court noted for the record it had spoken to the informant in chambers to satisfy defense counsel's concerns that the informant did not exist, and the court was satisfied as to the existence and veracity of the informant's knowledge of the facts alleged in the search warrant.

Since defense counsel requested that the court interview the informant to ascertain if an informant existed, defendant cannot now complain because the court did as he requested. The informant did not testify during the trial or any related proceedings, and the trial court did not vouch for the veracity of his or her testimony. The court did not demonstrate a personal bias, but noted it was satisfied with the issuance of the warrant, which had been signed by a different magistrate.

Defendant also claims the court should have ordered the evidence suppressed when it found out after denying the motion to suppress the informant actually purchased cocaine from the defendant instead of merely observing a transaction. Defendant claims the court either learned about the purchase when it interviewed the informant and thereafter should have realized the warrant was based on Agent Moran's intentional misrepresentations or learned about the purchase during the trial and thus had a due process obligation to order the disclosure of the informant's identity.

To the extent defendant claims the evidence should have been suppressed when the court found out the informant purchased cocaine, we have previously concluded the statements were not made to intentionally deceive the magistrate so as to warrant suppression. Defendant's claims regarding disclosure of the

informant's identity will be discussed below. This assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER THREE

Defendant's third assignment of error claims the court erred by refusing to order disclosure of the identity of a confidential informant. Defendant alleges the court's actions abridged his right of confrontation and impaired his ability to present a defense at the suppression hearing and the trial.

Louisiana Code of Evidence article 514(A) provides for an informant's privilege:

The United States, a state, or subdivision thereof has a privilege to refuse to disclose, and to protect another from required disclosure of, the identity of a person who has furnished information in order to assist in an investigation of a possible violation of a criminal law.

Exceptions to this privilege are listed in La. C.E. art. 514(C). Disclosure can be ordered when a party clearly demonstrates exceptional circumstances where the informer's testimony is essential to the preparation of the defense or a fair determination on the issue of guilt or innocence. One situation where the informer's testimony may be essential is where the informer actually participated in the transaction. See Roviaro v. United States, 353 U.S. 53, 60-62, 77 S.Ct. 623, 628-629, 1 L.Ed.2d 639 (1957); State v. Davis, 411 So. 2d 434, 436 (La. 1982). However, the burden rests with the accused to set forth concrete reasons why the identity of the informant is crucial to the defense. State v. Broadway, 96-2659, pp. 19-20 (La. 10/19/99), 753 So. 2d 801, 815, cert. denied, 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000).

Defendant was not charged with distribution of contraband, but with possession with intent to distribute cocaine and marijuana. The confidential informant did not play a crucial role in the transaction that led to the defendant's arrest because he played no part in the execution of the search warrant and the

subsequent search. See State v. Diliberto, 362 So. 2d 566, 567-568 (La. 1978). Since the informant did not participate in a transaction for which defendant was charged, defendant's right to confrontation was not abridged. Defendant acknowledges the existence of jurisprudence indicating that even if the affidavit indicated the informant made a controlled buy to corroborate information for the warrant, disclosure of the informant would not be required. See State v. Clark, 05-61, p. 14 (La. App. 5th Cir. 6/28/05), 909 So. 2d 1007, 1015-16, writ denied, 05-2119 (La. 3/17/06), 925 So. 2d 538. He contends, however, that although Moran testified the controlled buy was not included in the affidavit because he wanted to protect the informant, the state's true reason for withholding the information was to reserve the incident for another charge if no contraband was found during the search or defendant was not present, and it is because of his intentional misrepresentation the court should have ordered disclosure of the informant's identity. This claim is unsubstantiated conjecture.

Defendant also claims under U.S. v. Carmichael, 489 F.2d 983 (7th Cir. 1973), (on rehearing), the name of the informant should have been disclosed because the informant possessed information to show bad faith misrepresentations in the warrant affidavit. Having previously concluded Moran's representations were not made to deceive the issuing magistrate, we find no merit in this claim.

ASSIGNMENTS OF ERROR FOUR AND FIVE

In his fourth assignment of error, defendant claims he was denied due process because the state failed to comply with a specific discovery request. In his fifth assignment of error, defendant claims the trial court erred by not declaring a mistrial after the state introduced evidence of other crimes by the defendant. Defendant combines these assignments of error in one argument.

At issue again is Moran's disclosure that the confidential informant actually had purchased cocaine from defendant the day before the search. Defense counsel

objected to the “ambush” and requested a mistrial. After a short hearing out of the presence of the jury, the court denied the motion for mistrial.

Defendant claims he was entitled to a mistrial on two grounds: (1) the prosecutor failed to disclose the transaction and participated in the “cover-up” by Moran during the hearing, and (2) the introduction of “other crimes” evidence by the state’s chief witness. Defendant claims he asked for the disclosure of impeachment and “other crimes” evidence during discovery and the information was not provided. He alleges he was misled by the prosecutor into believing no “other crimes” evidence would be introduced since none had been disclosed.

Although defendant claims he repeatedly asked the state for discovery and is entitled to a mistrial because of the state’s failure to comply with discovery procedures, the defense is not typically entitled to evidence the state does not plan to introduce at the trial. See La. C.Cr.P. art. 716, et seq. Defendant’s claim that he is entitled to the information is based on his argument that the information constituted impeachment evidence by which he could have shown Moran misrepresented what the informant saw. We have previously concluded Moran did not intentionally misrepresent the circumstances in order to deceive the magistrate. Moreover, we question whether defense counsel would have deliberately chosen to present evidence defendant sold contraband in order to impeach Moran’s testimony. Since this evidence was not exculpatory or impeachment evidence, the court did not err in failing to grant a mistrial on discovery grounds.

Defendant’s second claim he was entitled to a mistrial also has no merit. The state did not solicit the information about the cocaine purchase. Trial counsel undoubtedly wished to make a point to the jury that the search had been undertaken without thorough investigation, but every advocate is aware there is an element of danger in venturing into unknown territory. The issue of whether the

informant bought contraband or simply observed a transaction actually was raised by the court during the hearing on defendant's motions to suppress, and defense counsel was aware of the possibility a controlled purchase had been made the day before the search. Defendant cannot now complain the results of the agents' attempt to verify information presented by the defendant prejudiced him given that defense counsel opened the door to this line of questioning. State v. Taylor, 01-1638, pp. 17-18 (La. 1/14/03), 838 So. 2d 729, 746, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004). These assignments of error have no merit.

ASSIGNMENT OF ERROR NUMBER SIX

In his final assignment of error, defendant claims the court imposed sentences that are excessive both by their length and consecutive service. He also contends the sentences were based on an inadequate presentence investigation.

The court ordered a presentence investigation report at the conclusion of trial. Although the state contends the court followed its customary practice of ordering an abbreviated PSI, the transcript does not indicate the court limited the scope of the examination. The investigation report is in fact limited. However, defendant did not assert in his motion to reconsider sentence that the trial court failed to perform an adequate presentence investigation. Pursuant to La. Code Crim. P. art. 881.1(E), defendant's failure to include this specific ground in his motion to reconsider precludes him from urging it for the first time on appeal.

Defendant also claims the sentences are excessive because of their length and because the court ordered them to be served consecutively. For his conviction of possession with intent to distribute marijuana, defendant was subject to a penalty of five to thirty years at hard labor, with an additional fine of up to \$50,000.00. La. R.S. 40:966(B)(3). For his conviction of possession of cocaine,

defendant was subject to a penalty of up to five years with or without hard labor and a fine of up to \$5,000.00. La. R.S. 40:967(C)(2).

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. State v. Lobato, 603 So. 2d 739, 751 (La. 1992). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. State v. Lobato, 603 So. 2d at 751.

Defendant was subject to imprisonment for up to thirty-five years at hard labor and fines up to \$55,000.00. During the sentencing proceeding, the court asked to be reminded of the circumstances of the case before imposing sentence. The total amount of imprisonment ordered by the court was twenty-five years at hard labor, less than defendant could have received for the marijuana conviction alone. Accordingly, this assignment of error has no merit.

SENTENCES AND CONVICTIONS AFFIRMED.