NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1431

STATE OF LOUISIANA

VERSUS

ROY FERRAND, JR.

Judgment Rendered: March 25, 2011

* * * * * * * *

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 428896

The Honorable Allison H. Penzato, Judge Presiding

* * * * * * * *

Walter P. Reed
District Attorney
Kathryn W. Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Lieu T. Vo Clark
Slidell, Louisiana

Counsel for Defendant/Appellant
Roy Ferrand, Jr.

* * * * * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

The defendant, Roy Ferrand, Jr., was charged by bill of information with attempted first degree murder, a violation of La. R.S. 14:27 and 14:30.[1] Defense counsel filed a motion to suppress the evidence and, following a hearing on the matter, the motion was denied.[2] Thereafter, the defendant withdrew his prior plea of not guilty and, at a *Boykin* hearing, entered a *Crosby* plea of guilty, reserving his right to challenge the trial court's ruling on the motion to suppress. See *State v. Crosby*, 338 So.2d 584 (La. 1976). The defendant was sentenced to ten years at hard labor without the benefit of parole. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

At the motion to suppress hearing on September 21, 2009, several law enforcement officers testified about the events surrounding the defendant's arrest and the subsequent application for and execution of several search warrants. According to the testimony of Detectives Alvin Hotard and Gus Bethea, both with the St. Tammany Parish Sheriff's Office, Donna Joseph lived with her boyfriend, Kevin Hatch, and their infant child at 1014 McBeth Court in Slidell.[3] Donna and the defendant knew each other and, in the past, were involved in a check-forging scheme in Lafayette. The defendant and Donna now conspired to rob Hatch of money he had obtained from selling drugs. Sometime after midnight on March 7, 2007, the defendant went to 1014 McBeth Court and used the house key given to him by Donna to

---

[1] The defendant was also charged with conspiracy to commit first degree murder. However, this charge was by dismissed the State when the defendant pled guilty.

[2] The defendant filed a pro se motion to suppress the evidence. The motion addressed essentially the same issues as the counseled motion to suppress.

[33] McBeth Court is referred to as Mcbeth (or Macbeth) Street in the search warrant affidavits, as well as in the court's ruling on the motion to suppress.

unlock the front door. When Hatch, from upstairs, heard the keys in the door, he told Donna to get into the bathroom with the baby. Hatch grabbed his gun and went downstairs. Donna heard gunshots and remained in the bathroom until the police arrived. Hatch had been shot and was taken to Northshore Regional Medical Center for treatment of his wounds.

After taking several statements from Donna, Detective Hotard learned that the defendant was the shooter. Detective Bethea prepared an arrest warrant for the defendant and several search warrants, including warrants to search the defendant's residence at 1946 Brookter Street in Slidell, the defendant's Chrysler Aspen vehicle, and the defendant's person (oral swab for buccal cells). Later on the same morning Hatch was shot, Detective Bethea presented all three search warrants to Judge William Knight, who signed them between 8:50 a.m. and 8:53 a.m.

Police officers searched the defendant's residence and found several items, including a safe and its contents, a stack of blank check paper, and a box of "Verso" check paper. Police officers searched the defendant's Chrysler Aspen and found several items, including a black zipper bag that contained a .357 magnum handgun, a .45 Ruger semiautomatic handgun, and several loose .45 caliber bullets.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in denying his motion to suppress evidence seized by police officers. Specifically, the defendant contends that the search warrant affidavits for the defendant's person, car, and house did not establish probable cause because they contained incorrect information and intentional misrepresentations.

When a search and seizure of evidence is conducted pursuant to a search warrant, the defendant has the burden to prove the grounds of his

motion to suppress. La. Code Crim. P. art. 703(D); *State v. Hunter*, 632 So.2d 786, 788 (La. App. 1st Cir. 1993), writ denied, 94-0752 (La. 6/17/94), 638 So.2d 1092. A trial court is afforded great discretion when ruling on a motion to suppress, and its ruling will not be disturbed absent abuse of that discretion. *State v. Wilder*, 09-2322 (La. 12/18/09); 24 So.3d 197, 197 (*per curiam*).

Article 1, § 5 of the Louisiana Constitution requires that a search warrant may issue only upon an affidavit establishing probable cause to the satisfaction of an impartial magistrate. See also La. Code Crim. P. art. 162(A). Probable cause exists when the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched. *State v. Johnson*, 408 So.2d 1280, 1283 (La. 1982). The facts establishing the existence of probable cause for the warrant must be contained within the four corners of the affidavit. *State v. Duncan*, 420 So.2d 1105, 1108 (La. 1982); *State v. Green*, 2002-1022, p. 8 (La. 12/4/02), 831 So.2d 962, 969.

An issuing magistrate must make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit, there is a "fair probability" that evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983); *State v. Byrd*, 568 So.2d 554, 559 (La. 1990). The process of determining probable cause for the issuance of a search warrant does not involve certainties or proof beyond a reasonable doubt, or even a prima facie showing, but rather involves probabilities of human behavior, as understood by persons trained in law enforcement and as based on the totality of

circumstances. The process 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. See *State v. Rodrigue,* 437 So.2d 830, 832-33 (La. 1983); *Green*, 2002-1022 at p. 7, 831 So.2d at 968-69.

The review of a magistrate's determination of probable cause prior to issuing a warrant is entitled to significant deference by reviewing courts. "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review." *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331. Further, because of "the preference to be accorded to warrants," marginal cases should be resolved in favor of a finding that the issuing magistrate's judgment was reasonable. *United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965); see *Rodrigue*, 437 So.2d at 833.

In the instant matter, the defendant contends that the three search warrants and affidavits prepared by Detective Bethea for the search of the defendant's person, car, and house contained material misrepresentations that undermined a finding of probable cause for the issuance of the warrants. According to the defendant, police officers knew Donna lacked credibility because she kept changing her story with each successive statement she gave. The defendant characterizes Donna's third statement to the police, wherein she identified the defendant by his full name, as a "complete contradiction" to her first statement, wherein she identified the defendant as "Roy," an acquaintance. The defendant also suggests that in her fourth statement to the police, Donna provided information that was "inconsistent" with her previous statements. The defendant further points out that one of

the search warrant affidavits provided information that misled the magistrate into believing that the defendant was seen attempting to drive off from the scene of the shooting.

According to the testimony of Detectives Hotard and Bethea at the motion to suppress hearing, during her initial encounter with police officers, Donna withheld important information regarding the incident, specifically information about her own involvement in the plan to rob Hatch. During subsequent statements she made to the police, Donna became more forthcoming with her role in the incident. However, the information she provided to the police regarding the defendant's involvement was consistent. While Donna revealed more information regarding the defendant's involvement during each successive statement to the police, Donna implicated the defendant during her first encounter with the police.

For example, Detective Hotard testified that when he first spoke to Donna at the crime scene, Donna told him that while she and Kevin Hatch, her boyfriend, were lying down, they heard someone trying to open the front door. Hatch grabbed his gun, and Donna and her young child went into the bathroom. Donna then heard gunshots. Donna also said that Roy, whose last name starts with an "F," was going to get her, and that the Mitsubishi Gallant in front of the residence belonged to Roy. Donna told Detective Hotard she knew where "Roy F" lived. The police drove Donna around and asked her to point out the defendant's residence. Donna pointed out 1946 Brookter Street, the defendant's residence.

Donna was subsequently brought to the Slidell Law Enforcement Complex. Detective Hotard testified that Donna told him she thought Roy's last name was "Farrin or Ferrin or something to that effect." The name was run in the computer system, which revealed that he lived at the Brookter

Street residence indicated by Donna. Donna then identified the defendant in a six-person photographic lineup. At this time, police officers were sent to the defendant's residence to conduct surveillance, and to apprehend the defendant if he left his residence. The defendant left his residence in his Chrysler Aspen, and shortly thereafter, police officers conducted a felony traffic stop and arrested the defendant.

Subsequently, Donna provided the police with three more statements, all of which were recorded. Donna's first two statements were not recorded. Detective Hotard testified that in her third statement, Donna told him she and the defendant were acquaintances who were involved in a check-forging scheme in Lafayette. At this point, Donna was *Mirandized.* Donna continued her statement and told Detective Hotard that she and the defendant had discussed robbing Hatch of his money he had obtained from selling drugs. Initially, the defendant wanted Donna to steal Hatch's money, but when Donna failed to comply with the request, the defendant took Hatch's house key from Donna. Late at night on March 6, 2007, shortly before the shooting, the defendant called Donna and told her he (defendant) was coming over to rob Hatch and that if Hatch did not cooperate, he was going to kill him. At this point, Detectives Hotard and Bethea felt they had sufficient probable cause to issue an arrest warrant for the defendant and a search warrant for his residence.

When Donna gave her second recorded statement, the warrants at issue had already been obtained. The police had learned that Donna had an outstanding warrant for forging checks. Donna, therefore, informed the police that she had not told the entire truth during her first recorded statement. According to Detective Hotard's testimony, the difference between Donna's first and second recorded statements was increased

disclosure of her full involvement in the crime. Donna subsequently gave a third recorded statement, and similarly, her level of involvement in the crime had increased in this final statement. However, in neither the second nor third recorded statement did Donna indicate that someone other than the defendant had entered the house and shot Hatch.

Based on the information he obtained from Donna, as well as from other police officers involved with the case, Detective Bethea prepared the three search warrants and search warrant affidavits at issue. The following identical language upon which probable cause was based was used in all three search warrant affidavits:

> On March 07, 2007 the Saint Tammany Parish Sheriff's Office responded to a shooting located at 1014 Mcbeth Street, Slidell, Louisiana. Upon arrival, deputies located the victim, Kevin Hatch, who appeared to have suffered from multiple gunshot wounds about the body. The victim was subsequently transported to the hospital in critical life-threatening condition. Upon an initial sweep of 1014 Macbeth [*sic*] Street, deputies located a witness identified as Donna Joseph, the girlfriend of the victim. Investigators subsequently interviewed Joseph:
>
> According to Joseph, she and Kevin have been dating for the past three years. During that time, she has known Kevin to be involved with the purchasing, packaging, and distribution of illegal narcotics; including but not limited to "Crack" cocaine, marijuana, and powdered cocaine. Joseph continued to stated [*sic*], sometime in January she met a black male named Roy Ferrand through a mutual friend. Throughout Joseph and Ferrand's relationship, they have mutually been involved in the illegally [*sic*] forging of checks and other financial documents. About one week ago, Ferrand and Joseph began discussing plans to rob Hatch of his money that he earned through his illegal narcotics activity. On Monday, March 05, 2007 Ferrand told Joseph to steel [*sic*] Hatch's money from him and relinquish the money to Ferrand. On that Monday night when Joseph met with Ferrand she did not have any of Hatch's money with her. It was during that encounter when Joseph rendered Ferrand her house key in order to allow Ferrand to enter the house to rob Hatch. Ferrand beat Joseph because she did not initially give him any money; which resulted in her subsequent admission to Northshore Regional Hospital to treat her injuries. On Tuesday, March 06, 2007 in the late night hours Ferrand called Joseph at her house and told her that he was "coming

over to rob Hatch, and if he did not cooperate he was going to kill him".

Several hours later while Joseph and Hatch were sleeping in their bed at 1014 Mcbeth Street, they heard the front door unlock [*sic*] and open. Hatch got out of bed and started yelling "who is there, who is there". As Hatch began walk [*sic*] down the stairs Joseph heard a barrage of gunfire, which resulted in the injury sustained by Hatch. Joseph remained in the bedroom until deputies arrived and walked her outside. Joseph further added, as she was walking out side [*sic*] with deputies she observed a maroon Mitsubishi Gallant that she immediately recognized as the vehicle Ferrand drove. Joseph stated she was positive that was Ferrand's vehicle because she has been in that vehicle with him several time [*sic*] in the past.

Detective Bethea added the following paragraph to the affidavit for the search warrant of the Chrysler Aspen:

While investigators where [*sic*] conducting surveillance on 1014 Mcbeth Street, Slidell, Louisiana, investigators observed the suspect Roy Ferrand enter, the above described vehicle and attempt to drive off. The vehicle was subsequently stopped and held for further investigation.

The search warrant for the Aspen described the thing to be searched as a "Beige 2007, Chrysler Aspen, four door, Vehicle Identification number 1A8HX58P77F535033 bearing temporary license tag 12054305 Expiration 03-10-2007." While the search warrant affidavit for the Aspen indicated the defendant's vehicle was a Mitsubishi Gallant, Detective Bethea explained at the motion to suppress hearing that in the last paragraph of the Aspen affidavit where he stated investigators observed the defendant attempt to drive off in the above-described vehicle, the vehicle he was referring to was the Aspen.

In the search warrant for the oral swab of the defendant, there is no mention of the Aspen. However, Detective Bethea used similar language in the oral swab affidavit to the language in the Aspen affidavit, namely:

While investigators where [*sic*] conducting surveillance on 1014 Mcbeth Street, Slidell, Louisiana, investigators observed the suspect Roy Ferrand enter, the above described

vehicle and attempt to drive off. The vehicle in addition to Roy Ferrand was subsequently stopped and held for further investigation pending the outcome of subsequent Arrest Warrants and Search Warrants.

Thus, it appears that the only above-described vehicle that the oral swab affidavit could have been referencing was the Mitsubishi Gallant. If the oral swab affidavit, therefore, stated that investigators saw the defendant enter the Gallant and attempt to drive off, as suggested by defense counsel on cross-examination, then such a statement would have been incorrect:

Q. Now, is there any other vehicle described in State's Exhibit 4 other than the maroon Mitsubishi Gallant?

* * *

A. No, there is no other vehicle I described in this affidavit.
Q. So when your affidavit states in that paragraph I showed you, quote, the above-described vehicle, the above-described vehicle is the observed maroon Mitsubishi Gallant, correct?
A. Yes, sir.
Q. Now, did any investigator on this case ever observe the defendant, Roy Ferrand, enter the Mitsubishi Gallant at 1014 McBeth Street and attempt to drive off?
A. No, sir.
Q. That statement, therefore, is not true, is it?
A. No.

Both Detectives Hotard and Bethea also testified at trial that the reference to 1014 McBeth Court as the residence where surveillance was conducted was a typographical error. McBeth Court was where the shooting had occurred. No surveillance was conducted there. Officers conducted surveillance at 1946 Brookter Street, the defendant's residence.

Despite these errors, we find that all three search warrant affidavits established sufficient probable cause to search the defendant's person, car, and residence. The first three statements, which Donna had provided to the police before the search warrant affidavits were completed and presented to a magistrate, clearly implicated the defendant in the robbing and shooting of Hatch. After the robbery and shooting, the defendant went to his house for a short time. Police officers were able to conduct surveillance on the

defendant's house because it was accurately identified as such by Donna. The defendant was then observed by the police driving from his house in his Aspen. Both the defendant's car and house, therefore, could have contained evidence used, as well as obtained, in the commission of the crime, namely firearms, ammunition, drugs, money, and any other items the defendant might have taken from Hatch.

In its reasons for denying the motion to suppress, the court addressed the defendant's arguments regarding Donna's credibility and the mistakes in the affidavits, particularly as to the location of the surveillance and where the magistrate was led to believe that the defendant was seen entering the Gallant parked at the crime scene and attempting to drive away:

> With regard to Ms. Joseph's credibility, this Court does not agree with defendant that the inconsistency in the statements she gave to detectives tainted the other information included in the affidavits. To the contrary, this Court finds that the statements were not factually inconsistent, but increasingly revealed the extent of her culpability in the conspiracy to rob Kevin Hatch. She initially identified the shooter only as Roy F. She then identified him in a photo line-up. In the oral statement that concluded at 7:20 a.m., she admitted that she knew Roy Ferrand and that they discussed robbing Mr. Hatch.
>
> * * *
>
> There was no evidence that Detective Bethea, who presented the affidavits, had any intent to deceive Judge Knight, and thus, this Court re-examines the affidavits for probable cause after striking the incorrect statement contained therein that investigators were conducting surveillance on 1014 McBeth Street.
>
> The affidavit for the search warrant for the Beige 2007 Chrysler Aspen contains a detailed description of the vehicle, including the vehicle identification number and the license tag. In reciting the facts upon which probable cause is based, reference is made to a maroon Mitsubishi Gallant that Ms. Joseph recognized as the "vehicle Ferrand drove." The affidavit contains a statement that investigators observed Mr. Ferrand enter the above described vehicle. This Court finds that the vehicle to be searched, the 2007 Chrysler Aspen, was particularly described, and that probable cause existed for the search of the described vehicle, namely the 2007 Chrysler Aspen.

> The affidavit for the search warrant for the person of Roy Ferrand contains information supporting the identification of Mr. Ferrand as the perpetrator. The mistake as to the location of the surveillance and the observation of Mr. Ferrand entering "the above described vehicle" did not have a critical impact on the probable cause showing.

We agree with the trial court's assessment regarding these issues. While the statement regarding the surveillance conducted on McBeth Court and the statement in the oral swab affidavit that implied the defendant drove away in a Gallant were not correct, we do not find the statements to be intentional misrepresentations on the part of Detective Bethea. See *Byrd*, 568 So.2d at 559. Having determined that the misrepresentation in the Aspen affidavit regarding the surveillance on McBeth Court was not intentional, we excise it, as the trial court did, from the affidavit and examine the residue to determine whether probable cause was properly demonstrated. Similarly, in the oral swab affidavit, we examine the residue to determine whether probable cause was properly demonstrated after excising the following statement, which references surveillance on McBeth Court and suggests the defendant drove away in a Gallant: "While investigators were conducting surveillance on 1014 McBeth Street, Slidell, Louisiana, investigators observed the suspect Roy Ferrand enter, the above described vehicle and attempt to drive off." Considering the affidavits after the removal of the references to McBeth Court and the Gallant, we conclude that probable cause existed for the search of the Aspen and the defendant's person. See *State v. Rey*, 351 So.2d 489, 492 (La. 1977).[4] See also *Byrd*,

[4] In *Rey*, the supreme court stated:

> The Fifth Circuit Court of Appeals was faced with this problem in *United States v. Thomas,* 489 F.2d 664 (5th Cir. 1973), cert. denied, 423 U.S. 844, 96 S.Ct. 79, 46 L.Ed.2d 64 (1975). That court noted that when faced with an affidavit containing inaccurate statements the preferred approach is to excise the inaccurate statements and then examine the residue to determine if it supports a finding of probable cause. . . . We are in agreement with the approach described by the Fifth Circuit and adopt it as our own.

568 So.2d at 559-60. We find no intentional misrepresentations in the search warrant affidavit for 1946 Brookter Street requiring excision and, as such, conclude probable cause existed for the search of the defendant's residence. As noted by the court in its ruling, "The affidavit for the search warrant for the residence at 1946 Brookter Street contains no misstatement, and contains information supporting the identification of Mr. Ferrand as the shooter."

We also note that even had the three search warrants at issue been based on less than probable cause, under the *Leon* good-faith exception, the evidence seized pursuant to those search warrants would not be suppressed. It is well settled that even when a search warrant is found to be deficient, the seized evidence may nevertheless be admissible under the good-faith exception of *United States v. Leon*, 468 U.S. 897, 919-20, 104 S.Ct. 3405, 3418-19, 82 L.Ed.2d 677 (1984), wherein the United States Supreme Court held that the exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in an objectively reasonable good-faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid.

Under *Leon*, 468 U.S. at 923, 104 S.Ct. at 3421, four instances in which suppression remains an appropriate remedy are: (1) where the issuing magistrate was misled by information the affiant knew was false or would have known was false except for a reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his detached and neutral judicial role; (3) where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the warrant is so facially deficient-in failing to particularize the place to be searched or the things to be seized-that the

executing officers cannot reasonably presume it to be valid. *Id.* At 923, 3241.

The instances in which suppression remains an appropriate remedy enunciated in *Leon* clearly reflect that suppression of evidence seized pursuant to an invalid warrant is not a remedy to be lightly considered. Furthermore, the jurisprudence presumes good faith on the part of the executing officer, and the defendant bears the burden of demonstrating the necessity for suppression of evidence by establishing a lack of good faith. *State v. Maxwell*, 2009-1359, p. 11 (La. App. 1st Cir. 5/10/10), 38 So.3d 1086, 1092, writ denied, 2010-1284 (La. 9/17/10), 45 So.3d 1056.

Applying these factors to this case, we find that even if the three search warrants were to be considered defective, the good-faith exception would apply. The defendant did not establish a lack of good faith on the part of the executing officer. There were no intentionally misleading statements or material misrepresentations contained in the affidavits. There was no evidence that Judge Knight abandoned his neutral role in his issuance of the search warrants, nor was there anything on the face of the warrants that would make them so deficient that they could not be presumed valid. Detective Bethea provided the judge information gathered by the efforts of himself and other police officers. Detective Bethea was not unreasonable in believing he provided the judge with sufficient information to issue the search warrants. Accordingly, suppression of the evidence would not be appropriate under the *Leon* good-faith exception to the exclusionary rule. See *Maxwell*, 2009-1359 at pp. 11-12, 38 So.3d at 1092.

The trial court did not err in denying the defendant's motion to suppress. The assignment of error is without merit.

For the reasons set forth hereinabove, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.