

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

MASON SCOTT ARGUE and
LISA ARGUE,

Plaintiffs,

-v-

File No. 95-13202-PD
Hon. Philip E. Rodgers, Jr.

TRAVERSE NARCOTICS TEAM,
Defendant.

James M. Hunt (P24243)
Attorney for Plaintiffs

Michael J. Stein
Assistant Prosecuting Attorney
Attorney for Defendant

DECISION AND ORDER

This action arises as a result of Defendant's refusal to return business records, materials alleged to be drug paraphernalia, and other materials which were seized by the Defendant at Plaintiffs' residence, business location and rented storage unit on January 11, 1995. The record shows that, on January 10, 1995, District Court Judge Richard L. Benedict issued three search warrants which authorized the seizures. At the Settlement Conference held on August 25, 1995, this Court agreed to adjourn the trial to allow the parties an opportunity to present their written and oral arguments related to the validity of the search warrants. Subsequently, Defendant filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(4) and (6). The parties filed briefs in support of their respective arguments related to the motion and the search warrant issue. The parties presented their oral arguments to the Court on October 13, 1995. This Court has reviewed the motion, the briefs, the affidavit of TNT's Investigator, Allan S. Brown and the Court file.

In their Complaint in this Claim and Delivery action, Plaintiffs alleged, in paragraphs 15 through 19, that they were not provided a copy of the affidavit which was the basis for the authorization for the search warrants. Further, Plaintiffs alleged that they believe that the confiscated items were taken and detained unlawfully. Defendant, in its Answer to the Complaint, stated that the affidavit was suppressed pursuant to an order of the presiding judge of a multi-county citizens' grand jury. This Court is informed that, after the Settlement Conference and before the hearing held on October 13, 1995, Defendant provided a copy of the affidavit to Plaintiffs.

On page 2 of their brief, Plaintiffs set forth the following argument:

[T]he information contained in the affidavit supporting the search warrant did not demonstrate facts and circumstances which would warrant a person of reasonable prudence to believe that there is a "fair probability" that evidence of a crime or contraband sought would be found on Plaintiffs' premises. Therefore the warrant was not supported by probable cause.

At the hearing, Plaintiffs argued that there has been no showing that the informants were credible sources nor that the information provided by the informants was reliable. Plaintiffs contended that

the affidavit included stale information which undermined any reasonable expectation that any contraband or evidence relating to criminal activity would remain on the premises. In their brief, Plaintiffs contended that, "the earliest that anyone could possibly have placed marijuana at the places which were searched would have been 7 to 8 months prior to the issuance of the search warrant".

The applicable statute is MCL 780.653; MSA 28.1259(3), which provides, in pertinent part as follows:

780.653. Finding of reasonable or probable cause; affidavit, contents

Sec. 3. The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

(a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.

(b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

This Court finds the following ruling in *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d

6 (1991) to be helpful::

Defendant also argues that the search warrant was invalid under MCL 780.653; MSA 28.1259(3).

[3][4] We find no abuse of discretion here. A search warrant may be issued on the basis of an affidavit that contains hearsay. MCL Sec. 780.653; MSA Sec. 28.1259(3); *People v Sherbine*, 421 Mich 502, 364 NW2d 658 (1984). Where the information is supplied to the affiant by a named person, the affidavit must contain "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information." MCL Sec. 780.653; MSA Sec. 28.1259(3). It is well settled that a search warrant may be issued where the police have conducted an independent investigation to verify the information supplied by the informant. *People v Lucas*, 188 Mich App 554, 470 NW2d 460

(1991); *People v Sellars*, 153 Mich App 22, 27, 394 NW2d 133 (1986).

Another recent ruling which supported the presumption of reliability of information provided by identified citizens is found in *People v Powell*, 201 Mich App 516, 523; 506 NW2d 894 (1993). The Powell Court stated, *inter alia* that, "Michigan courts also consider identified citizens and police officers to be presumptively reliable." *Powell*, *supra*. See, e.g., *People v Goeckerman*, 126 Mich App 517, 522; 337 NW2d 557 (1983), and cases noted therein; *People v. Harris*, 95 Mich App 507; 291 NW2d 97 (1980); *People v Emmert*, 76 Mich App 26; 255 NW2d 757 (1977). With regard to the "staleness" issue, this Court finds the following excerpt from *US v 1328 N Main Street. Dayton. Ohio*, 713 F Supp 1495, 1518 (1988), to be helpful and instructive:

"The timeliness of probable cause cannot be assessed in a factual vacuum. Rather, timeliness and its converse, staleness, must be measured by the nature and regularity of the allegedly unlawful activity." *US v Nilsen*, 482 FSupp 1335, 1339 (DNJ 1980). One key factor to be considered is whether the Magistrate can "independently determine from the affidavit that 'there was no reason to believe that ... [the] operation had ceased.'" *Id* (Quoting *US v Forsythe*, 560 F2d 1127, 1132 (3d Cir 1977). In the recent case of *US v Word*, 806 F2d 658, 662 (6th Cir 1986), cert den, 480 US 922, 107 SCt 1383, 94 L Ed 2d 697 (1987), the Sixth Circuit in denying a claim of staleness, placed great emphasis upon the fact that the "the events alleged in the affidavit were of a continuing nature and the documents sought were business records prepared and kept in the ordinary course of business." Based upon the foregoing, this court concludes that two key questions must be answered with regard to the issue of staleness. First, are the events alleged in the affidavit part of a continuing violation? Second, is there some evidence that said violation has continued to the present day (or in this case the date upon which the warrant was initially sought, September 7, 1984)?

In this case the search warrants were issued as a result of a grand jury investigation which involved extensive law enforcement activity and coordination. In paragraphs 15 through 26 of the Affidavit for Search Warrant, TNT Detective Rick Robbins, summarized the grand jury testimony of named individuals, including Calvin Cornett, Tim Kubesh, Jean Marie Kirt-Kubesh, Jeff R. Frederickson, John Appolson, Renald Kulis and Robert VanCollie. In addition, Detective Robbins' affidavit is replete with details of Plaintiff's real property purchases, sales and transfers, and tax records of 1990 through 1993. Affiant/Detective provided sufficient details to show that there was reason for the Defendant law enforcement unit officers to believe that Plaintiff Mason Argue was involved in a continuing pattern of unlawful activity.

The affidavit testimony presented by Detective Robbins persuaded this Court that a reasonably prudent person could believe that there was a "fair probability" that evidence of a crime or contraband would be found on Plaintiffs' premises, at Mr. Argue's business and in a storage unit rented by his wife, Plaintiff Lisa Argue. *People v Russo*, 439 Mich 584; 604; 487 NW2d 698 (1992). Based on the information contained in the affidavit, there was no reason to

believe that Plaintiff Mason Argue had ceased the alleged illegal drug-related activity prior to the

date the search warrants were issued. N Main Street, *supra*. Based on the foregoing statutory and case law, it is the opinion of this Court that the search warrants were supported by credible, reliable information. MCL 780.653; *People v Harris, supra*; *People v Powell, supra*.

This Court now turns to the issue of whether Defendant has a continuing superior right of possession of the seized property which belongs to the Plaintiffs. Referring to incriminating evidence seized pursuant to the execution of a search warrant, MCL 780.655; MSA 28.1259(5), Michigan law provides, in pertinent part, that "[t]he property and things so seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence on any trial". A full year has passed since Plaintiffs' property was confiscated. Defendant argued at the hearing that Plaintiff Mason Argue is the subject of an ongoing criminal investigation for violations of the federal tax code and controlled substance laws and that the confiscated records and materials may be used as evidence in a trial.

With the motion, Defendant provided the affidavit of Allan S. Brown, an investigator for Defendant. Investigator Brown testified in the affidavit that the matter is under advisement awaiting possible action requests on the part of the Drug Enforcement Administration and/or the Federal Internal Revenue Service." Defendant argued that, as a result of the investigation and the grand jury proceedings, there is evidence that Plaintiff Mason Argue is being investigated for money laundering related to alleged marijuana growing and sales which may result in the filing of

criminal charges against Mr. Argue. Pursuant to the lawful seizure of Plaintiff's business records and personally, on January 11, 1995, Defendant had a temporary, superior right of possession to Plaintiff's property . *West Mason Inc v Jackson Co Prosecutor, 9S Mich App 447, 450; 291 NW2d 76 (1980)*. However in *People v Washington, 134 Mich App 504, 511; 351 NW2d 577 (1984)*, the Court of Appeals held that Defendant has the burden to establish lawful reason to deny return of Plaintiffs' property which has been held in excess of one year. There is no evidence before this Court that criminal charges have been filed against either Plaintiff in state or federal courts during the intervening year.

This Court found no authority which addressed a factually parallel situation. Unless criminal charges are filed against one or both Plaintiffs, Defendant shall return all of the seized materials, records and personally to Plaintiffs within 90 days of the date of this Order.

Washington, supra at 51 1-514.' In the interim, in light of the impending tax filing deadlines, Defendant shall allow Plaintiffs immediate access to all of the seized documents and things that

Footnote 1:

The Washington Court set forth long-standing law related to return of materials seized in a criminal investigation as follows:

In *Robinson v. Inches*, the Supreme Court held that while officers have a right to seize money to be used as evidence of gambling, it is their plain duty to return it when a complaint is neither made nor contemplated. The Supreme Court affirmed, granting mandamus for that defendant, saying it was the proper remedy. *Washington, supra* at 512.

Plaintiff identifies as necessary to meet Plaintiffs' 1995 tax filing deadlines. Defendant shall allow Plaintiffs to make copies of any and all documents which Plaintiffs indicate are necessary to meet their tax filing obligations. All such copies shall be made at Plaintiffs expense and under Defendant's supervision.

In light of the foregoing ruling and analysis, this Court will hold in abeyance any ruling on

Defendant's motion for summary disposition for a period of 90 days. In the event that Defendant returns the seized property to Plaintiffs within the 90 days following the issuance of this Order, Defendant's motion will be moot. In the event that, within 90 days of the date of this Order, the parties inform this Court that criminal charges have been brought against either one or both Plaintiffs, this Court will address the issues raised in Defendant's motion for summary disposition.² In the event that criminal charges are filed against one or both Plaintiffs within the ensuing 90 days, Defendant shall supplement its brief and address the standard of review and correlated arguments with respect to MCR 2.1 1 6(C)(4) and (6) or withdraw its motion for summary disposition.

IT IS SO ORDERED

HONORABLE PHILIP E. RODGERS, JR.

Circuit Court Judge

Dated: 2/29/96

Footnote 2:

Defendant, in its motion for summary disposition sought this Court's order of dismissal of this action "pursuant to MCR 2. 116(C)(4) and (6)". Defendant, in its brief in support of the motion, provided the standard of review for and referred only to subsection (C)(8). Predictably, this Court will require clarification of Defendant's intent and arguments, if, in the ensuing course of events, the Court considers Defendant's motion.