IN THE COURT OF APPEALS OF MARYLAND

No. 99

September Term, 1995

DAVID FRANK MCDONALD

v.

STATE OF MARYLAND

Murphy, C.J.*
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker,

JJ.

Dissenting Opinion by Chasanow, J.
in which Eldridge and Bell, JJ., join

Filed: October 20, 1997

* Murphy, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the adoption of this opinion.

The primary issue before the Court is whether the judge in the instant case erred in holding that the search warrant was a valid non-anticipatory warrant because probable cause could be based solely on the in-transit package of marijuana, and not be contingent on the delivery of that package. This is an important issue since, as this case demonstrates, more efforts are being made by package delivery agencies to detect drug shipments. The majority seems to acknowledge that other courts are far from uniform as to when an in-transit drug package furnishes probable cause for pre-delivery search of the place the package is to be delivered. The probable cause issue was so important we granted certiorari on our own motion prior to consideration of this case by the Court of Special Appeals. Instead of analyzing the issue and giving guidance to lower courts, the majority decides the case on an issue not reached by or decided by the trial judge.

FAILURE TO DECIDE PROBABLE CAUSE

When reviewing the validity of a search based on a search warrant, the preferred practice, for a trial court as well as for an appellate court, is to first determine if the warrant contains probable cause and, if not, then determine if there was good faith adequate to justify the search under *United States v. Leon*, 468 U.S. 897, 104 S.Ct.3405, 82 L.Ed. 897 (1984). By first determining whether the warrant contained probable cause, appellate courts will give guidance both to lower courts and to law enforcement agencies. The majority may be conveying the message that judges do not have to make difficult decisions concerning probable cause; if the probable cause issue is difficult for a judge to decide, the judge may

simply conclude that police officers applying for the warrant, who presumably know less about probable cause than judges, must have acted with objective good faith. If other judges reviewing search warrants follow our lead, the determination of probable cause may become an unnecessary anachronism. A reviewing judge will merely have to ascertain if the search warrant is so totally lacking in any indicia of probable cause that there could be no objective good faith by the applicant. There is also the danger that some judges or magistrates may follow this Court's approach to the instant case when they issue search warrants and not feel the need to carefully analyze whether probable cause exists as long as the police are acting in good faith. This danger will be even more likely to occur if judges and magistrates believe that the adequacy of the probable cause for the search warrant will not be reviewed or scrutinized. At the very least, we should explain to other judges reviewing and issuing search warrants with difficult probable cause issues like the one side-stepped by this Court today that they should not follow the approach of this State's highest Court to merely look to the good faith of the police officers seeking the warrant.

PROBABLE CAUSE

In the instant case, the State acknowledges that the search warrant was not an anticipatory warrant, that it was not conditioned on the future delivery of the marijuana, and that by its terms the warrant could have been executed as soon as it was signed. The State contended, however, that the search warrant contained probable cause for an immediate pre-delivery search irrespective of the anticipated future delivery. There are circumstances

where an intercepted shipment of drugs coupled with police observations, knowledge and expertise can provide probable cause for a pre-delivery search warrant. This case, however, is not one of them.

The majority does not say this warrant contains probable cause; unfortunately it says nothing on the issue. For many of the same reasons that I question the objective good faith of the officers executing this search warrant, I do not believe that the application for the search warrant in the instant case contained probable cause. The package of marijuana at issue did not indicate a very large volume of marijuana. The wrapped package was sixteen inches wide by sixteen inches deep by sixteen and a half inches tall. Other than the address on the package, there is not one scintilla of evidence that the address or any of the persons believed to reside at that location had any prior association with drugs or drug activities. Surveillance prior to the delivery of the package did not indicate any drug activity at that address, and there is no record of drug activity by anyone associated with the address. Moreover, the fact that the addressee of the package was not an occupant of the residence might be an indication that the package is misaddressed or the occupants were merely accommodating the addressee. Additional surveillance or search of relevant records should be required in order to furnish some further evidence of a drug operation at a particular address that might indicate the probable presence of incriminating evidence or contraband.

As a result of the majority's decision, unscrupulous people may now be able to procure a police search of anyone's house, office, etc. by anonymously mailing a small package of drugs to a fictitious addressee at the target address and calling in an anonymous

tip to the package delivery service or postal inspectors to check the package. Although not relevant to the legal issues, it is interesting to note that not only was it doubtful that probable cause existed to believe there was evidence of drug dealing in the house before the marijuana delivery, no such evidence was found as a result of the search. There were no drug dealer's records, scales, packaging materials, etc. seized, and the only papers taken were those that indicated who resided in the apartment. Further, the only incriminating evidence outside of the marijuana was a marijuana pipe and rolling papers indicative of personal use rather than distribution.

OBJECTIVE GOOD FAITH

In order to uphold the search in the instant case, the majority finds that the law enforcement officers who applied for and then executed this search warrant acted with objective good faith. In so finding the majority is not reviewing a good faith finding of the trial court; instead, it is making its own finding on an issue not decided by the trial judge. There may be instances in which there is no real dispute about the facts or any inferences that could be drawn from those facts where an appellate court reviewing a search warrant can conclude both that the lower court erred in finding probable cause for the warrant, as well as make its own finding that the search was valid because it is clear that the police acted with objective good faith. *Cf. Connelly v. State*, 322 Md. 719, 589 A.2d. 958 (1991). Where, however, as in the instant case there is a need for factual findings and there are disputed factual inferences relevant to a finding of "good faith," we should remand the case to the trial

court for a full evidentiary hearing to determine "good faith."

In order to decide the case on objective good faith rather than on probable cause, the majority must have assumed for the purpose of its analysis that the search warrant did not contain probable cause. The majority then made a finding that the police believed that the warrant contained probable cause and that the police acted with objective good faith on that belief. I have grave doubts about whether the officers in the instant case acted with good faith, and the record is inadequate for this Court to make an affirmative finding of objective good faith. The most we should do is remand the issue to the trial court for a further factual hearing and determination of good faith. If the officers had a good faith belief that the search warrant would uncover evidence of drug dealing, why did they delay executing the warrant until they delivered the marijuana to the premises? The officers had the search warrant for the premises, and they had possession of the package of drugs addressed to the premises, so there was no need to delay the search unless their real, unstated purpose was to catch someone in actual possession of the marijuana they would deliver.

In *Leon*, the Supreme Court recognized:

> "If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect ... it must alter the behavior of individual law enforcement officers or the policies of their departments.... We ... conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule."

468 U.S. at 918, 104 S.Ct. at 3418, 82 L.Ed. at 695. In the instant case, exclusion of the

marijuana seized would further the purposes of the exclusionary rule. It is a bad policy for police officers to claim to be seeking an immediate search warrant for evidence of drug dealing when what they are really seeking is an anticipatory warrant to catch someone "red handed" with a package of marijuana to be delivered after the warrant is issued and thus avoid the very rigid requirements for an anticipatory search warrant. The State acknowledges that neither this Court, nor the Supreme Court, has yet upheld the validity of anticipatory search warrants. *See State v. Lee,* 330 Md. 320, 329, 624 A.2d 492, 49_, (1993)("This record does not compel a constitutional review of anticipatory search warrants, which must await a future case."). In fact, a case presenting this issue is set for argument before this Court. *See Kostelec v. State*, No. 17, September term 1997. The warrant in the instant case is a typical anticipatory warrant. In *Lee*, we noted that "[anticipatory] warrants typically issue when the police have orchestrated a controlled delivery of contraband which 'is on a sure course to its destination.'" 330 Md. at 328, 624 A.2d. at 496 (citations omitted). Many courts have recognized anticipatory warrants, but they have imposed rigid requirements which are not contained in the instant warrant. *See, e.g.,, U. S. v. Ricciardelli*, 998 F.2d. 8 (1st Cir. 1993); *U. S. v. Garcia*, 882 F.2d 699 (2d. Cir.), *cert. denied*, 493 U.S. 943 (1989).

The State vociferously argues, and this Court finds, that a non-anticipatory search warrant was sought for the items in the house at the time the warrant was issued and that the police were not seeking an anticipatory search warrant for the marijuana to be delivered after the search warrant was issued. That finding is at least questionable based on the record.

Even before they applied for the search warrant, the officers had possession of the undelivered package of marijuana. Immediately after obtaining the search warrant, the officers installed an electronic monitoring device in the package of marijuana designed to emit a signal when the package was opened. They went to the location to be searched and waited because no one was home to receive the package of marijuana. After delivering the package of marijuana, they further waited for an additional one-half hour so there was plenty of time to open the package. Are these the actions of officers who believe there is presently probable cause to search and intend to execute a non-anticipatory search warrant for the paraphernalia of a drug dealer, or are these the actions of officers intending to execute an anticipatory search warrant to catch someone with marijuana after the marijuana is delivered?

If the officers actually believed in good faith that they were executing a non-anticipatory warrant and would find incriminating evidence independent of the anticipated marijuana delivery, why did they not execute the search warrant as soon as they received it? At that point, they had possession of the marijuana package to bolster whatever evidence of a drug operation they found in the house. The officers obviously intended to and did delay their search until after the marijuana's delivery for the purpose of catching someone "red handed" with the drugs they were delivering. This is an indication the officers had doubts about whether they would find incriminating evidence of distribution prior to the marijuana delivery, as well as an indication that the primary purpose of the search warrant was to catch someone with the marijuana they would later deliver. If the officers in the instant case were

seeking an anticipatory search warrant, they should have told that to the issuing judge and seen if the judge would issue an anticipatory warrant. It should not be considered to be objective good faith when law enforcement officers seek a non-anticipatory warrant for evidence of drug dealing with questionable probable cause and immediately thereafter use the non-anticipatory warrant as an anticipatory warrant to set up a drug delivery and seizure. The most logical assumption is that the officers knew that the non-anticipatory warrant, which the majority assumes lacked probable cause, would be unlikely to uncover evidence of drug dealing; so after getting the warrant, they delivered the evidence of drug dealing to the premises. Indeed, as already noted, there was no evidence of drug dealing on the premises until the officers delivered it.

U. S. v. Ricciardelli, 998 F.2d. 8 (1st Cir. 1993) is instructive on the issue before this Court. The defendant in *Ricciardelli* was the subject of an investigation of child pornography. His name appeared on a list of child pornography customers. Postal inspectors sent the defendant a catalog from which he ordered several pornographic videotapes, one of which was mailed to him. After mailing the tape, the postal inspectors obtained a search warrant which was found to be invalid because it did not condition the search upon the arrival of the videotape at the home, but rather it was conditioned upon the defendants receipt of the tape regardless of where that occurred. The prosecution argued that, even if the warrant was invalid, the good faith exception should apply. The Court of Appeals for the First Circuit found no objective good faith and what they said is equally applicable in the instant case:

> "The law was settled that the conditions governing the execution of anticipatory warrants must be explicit, clear, and narrowly drawn. The instant warrant plainly did not satisfy these criteria; and, furthermore, the principal omission in the warrant--the lack of any requirement that the contraband arrive at the premises--was both glaring and easily correctable. Examining the postal inspectors' actions in this light, it is crystal clear that they could, and should, have asked the magistrate to condition the search of appellant's home on the delivery of the videotape there; failing both to insert this condition and to recognize the consequences of its omission constituted objectively unreasonable conduct. It follows, then, that attempting to execute an anticipatory search warrant bereft of such a limiting condition fell `outside the range of professional competence expected' of federal agents." (Citations omitted).

998 F.2d at 161.

There are other indications of a lack of good faith in the instant case which bear mentioning since they are ignored in the majority's finding of objective good faith. In *Leon*, the Supreme Court gave examples of when there can be no objective good faith; one of them was 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." *Leon*, 468 U.S. at 922-23, 104 S.Ct. at 3420-21, 82 L.Ed. at 689-99; *see also Minor v. State*, 334 Md. 707, 713, 641 A.2d 214, 216 (1994). In the instant case, there is a reasonable probability that the judicial officer was misled by vital information in the warrant that the affiant knew was false or "would have known was false except for his reckless disregard of the truth." Information brought out at the suppression hearing showed that in his affidavit the officer may have intentionally or recklessly doubled the amount of marijuana to be delivered.

The only way this search warrant could contain probable cause prior to the delivery of the marijuana package would be if the warrant established that the recipients were large scale drug dealers with an operation of sufficient scope that they would probably have records, scales, paraphernalia, etc. At the suppression hearing, the officer testified that prior to obtaining the search warrant, "I weighed the package prior to the delivery. It was [in] packaging material, in all it weighed 18 pounds. But taking the marijuana away from the packaging material it turned out to be about nine pounds." There was other testimony that the marijuana weighed about nine pounds. In his affidavit the officer both by implication and express statement indicates to the judicial officer that there was twice as much marijuana as there actually was. The affiant's first statement about quantity is true, although perhaps not candid; he stated: "your Affiant then weighed the box containing the marijuana and found it to weigh eighteen and one quarter pound (18 1/4 lb)." The affidavit then goes on to state: "In summary, a United Parcel Service (UPS) package received by your Affiant from Detectives with the San Diego Police Department, San Diego California via the United parcel Service, contained approximately eighteen (18) pounds of suspected Marijuana." This clearly indicates 18 pounds of marijuana, not an 18 pound package with nine or less pounds of marijuana. The significance of this distortion is seen by a key sentence in the warrant: "That based on your Affiant's, Tideberg's knowledge, training and expertise, your Affiant knows that eighteen (18) pounds of suspected marijuana is enough marijuana to indicate an intent to distribute marijuana." The judicial officer might have been willing to accept that 18 pounds of marijuana was enough to indicate a large scale operation which would be

expected to have records, etc., but might not accept that only half that amount, *i.e.*, nine pounds of marijuana, was enough to indicate that any recipient operated a large scale drug operation with books, records, etc. The determinations about whether the judicial officer was misled and whether the affiant knew his affidavit was false or acted with reckless disregard of the truth should be made in the first instance by the trial court after a full hearing and not by an appellate court.

Further indication that the issuing judge might have been misled is found in the majority's statement that "nowhere does the affidavit indicate that the execution of the warrant was contingent upon the delivery of the package or any other event. Furthermore, the affiant does not aver that he or anyone else intended to deliver the package." ___ Md. ___, ___, ___ A.2d ___, ___ (1997)(Majority Op. at 13). The affiant obviously intended to deliver the package after getting the warrant. The majority should not make a finding of objective good faith that ignores the reasonable inference from this record that the officers probably intended that the non-anticipatory search warrant be used as an anticipatory warrant and that they probably doubted that they would find incriminating evidence of drug dealing prior to their delivery of the marijuana. Those doubts proved to be right; no such evidence was found.

There are dangerous aspects to the majority's opinion. There is the danger that if this State's highest Court when reviewing a search warrant avoids a difficult probable cause analysis and only examines whether the police acted with objective good faith, then there might be a terrible temptation for judges reviewing search warrants or for judges issuing

search warrants to do the same thing. There is also the danger that the police in effect can get an anticipatory search warrant as long as they can make an "objective good faith" application for a non-anticipatory search warrant, even if the application lacks probable cause. I respectfully dissent.

Chief Judge Bell and Judge Eldridge have authorized me to state that they join in the views expressed in this dissenting opinion.