2017 IL App (2d) 160061-U
No. 2-16-0061
Order filed January 17, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellant,	)	
v.	)	No. 14-CF-1043
ANDRZEJ HRYNIEWICKI,	)	Honorable Michael W. Feetterer,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant's motion to quash a search warrant and suppress the resulting evidence: although some of the facts presented to the issuing judge were unreliable, the remaining facts provided a substantial basis for finding probable cause; alternatively, the affiant relied on the warrant in good faith, as he did not intentionally or recklessly submit false information and he provided enough facts to support at least a reasonable belief that probable cause existed.

¶ 2 The State appeals from the judgment of the circuit court of McHenry County granting defendant Andrzej Hryniewicki's motion to quash a search warrant and suppress evidence. Because there was a substantial basis for probable cause to support the search warrant and, even

if not, the officer providing the affidavit had a good-faith basis for relying on the search warrant, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of trafficking more than 2,500 grams of cannabis (720 ILCS 550/5.1(a) (West 2014)), one count of unlawful possession with intent to deliver more than 5,000 grams of cannabis (720 ILCS 550/5(g) (West 2014)), and one count of unlawful possession of more than 5,000 grams of cannabis (720 ILCS 550/4(g) (West 2014)). Defendant moved to quash the search warrant and suppress over 144,000 grams of cannabis seized from an airplane and its hangar.

¶ 5 Officer Paul Lindley of the Aurora police department, who had approximately 10 years' experience investigating drug crimes, was assigned to the Department of Homeland Security to investigate narcotics offenses. Officer Lindley submitted his affidavit in support of his application for a search warrant. Officer Lindley averred that on November 18, 2014, a Piper PA 23 airplane left the Sacramento, California, area and headed to the Chicago area. Officer Lindley stated that he knew from his training and experience that the Sacramento area was a "source *** for cannabis and narcotics smuggling as several cannabis grow operations [were] located [there]."

¶ 6 According to the affidavit, the plane had an intermittent transponder.[1] Based on his training and experience, as well as knowledge gathered from other law enforcement sources, Officer Lindley averred that a transponder on an aircraft should be on at all times. According to

[1] Although the affidavit used the term "internment" transponder, the parties agreed below, and on appeal, that that was a typographical error and that Officer Lindley meant "intermittent." Thus, like the trial court, we will use the latter term.

Officer Lindley, a transponder allows air traffic control to monitor aircraft, and pilots who turn the transponder on and off "may do so *** to evade detection of flight paths [by] *** law enforcement."

¶ 7 The airplane stopped in Utah to refuel. In doing so, the pilot entered into the fueling computer system, instead of the plane's tail number "N121JH," the incorrect tail number " 'NNNNN.' " Officer Lindley opined that that was an attempt to avoid being tracked by law enforcement.

¶ 8 Officer Lindley averred that, while the airplane was being refueled in Utah, a "source of information" who "wish[ed] to remain anonymous" reported that there were two people in the plane. The anonymous source also reported that all but one of the curtains on the plane was pulled down. The source observed several large duffel bags in the passenger compartment of the plane, "piled to the windows."

¶ 9 The plane left Utah and flew toward Illinois. As the plane approached the Galt Airport near Wonder Lake, a Customs and Border Protection (CBP) aircraft monitored its flight. The plane landed at the Galt Airport and taxied to hangar E8. As two unidentified males pushed the plane into hangar E8, a CBP helicopter illuminated the plane and hangar. The pair "hastily" pushed the plane into the hangar and closed the doors. They then departed the hangar "very quickly."

¶ 10 CBP agents observed a male exit the hangar and enter an automobile. CBP air units continued to observe the vehicle as it drove around the airport for approximately an hour. Officers on the ground watched the vehicle and stopped it after the driver disregarded a traffic-control device.

¶ 11 The driver was Terry Peterson. Peterson stated that he was lost and trying to find Galt Airport. He denied that he had been flying or had been at the airport. When the agents told Peterson that they had been observing him, he reiterated that he had not been at the airport and he claimed that he had come from the Poplar Grove area. He admitted that he had rented a hangar at the airport but would neither identify the hangar nor take the agents to it. Although he consented to a search of his vehicle, he refused to consent to a search of his hangar. Upon searching Peterson's vehicle, the agents found a lease for hangar E8. The agents then released Peterson.

¶ 12 The agents located hangar E8 and confirmed with air units that that was the hangar from which Peterson had exited. Agents continuously monitored hangar E8 from when the plane arrived until Officer Lindley sought the search warrant. Based on his experience and training, Officer Lindley averred that cannabis or other contraband would be found in hangar E8.

¶ 13 A judge issued a search warrant. The search of hangar E8 and the plane uncovered approximately 144,698 grams of cannabis.

¶ 14 Defendant filed a motion to quash the search warrant and suppress the evidence, contending that the affidavit lacked a substantial basis to conclude that there was probable cause to search the hangar and the plane. In granting the motion, the trial court ruled that there was not a substantial basis for probable cause to support the search warrant. It noted that ordinarily it would address the alternative issue of whether the officers relied in good faith on the warrant. However, because the State did not raise the good-faith exception to the exclusionary rule, it would not decide that issue.

¶ 15 The State, in turn, filed a motion to reconsider, in which it contended that: (1) there was a substantial basis for probable cause; and (2) the officers relied in good faith on the search

warrant. Defendant, in responding, contended, in part, that the State "waived and forfeited" the good-faith argument, because it did not raise it until the motion to reconsider.

¶ 16 The trial court conducted a hearing on the motion to reconsider. At the hearing, defendant never raised the forfeiture issue.

¶ 17 Officer Lindley testified at the hearing that he had attended training on air interdiction for narcotics. The training included aircraft smuggling, hidden aircraft compartments, and the manipulation of aircraft fuel systems. The training did not cover the Federal Aviation Administration Aeronautical Information Manual (eff. Apr. 3, 2014) (AIM).

¶ 18 After receiving information regarding a suspicious aircraft near Galt Airport, Officer Lindley sought a search warrant for hangar E8. According to Officer Lindley, the issuing judge read the materials presented in support of the warrant. Officer Lindley denied that the affidavit contained false information. He was not aware of any facial deficiencies in the warrant that would indicate that it was not valid. He believed that the affidavit presented probable cause for the warrant.

¶ 19 On cross-examination, Officer Lindley admitted that he never received any training on the use of aircraft transponders or controlled and uncontrolled air space. According to Officer Lindley, he learned from a CBP pilot that a transponder must be on at all times. He admitted that he did not know whether the transponder on the plane was off when it was in uncontrolled airspace and on when it was in controlled airspace, as set forth in the AIM.

¶ 20 Officer Lindley explained that he learned from someone at the Air and Marine Operations Center (AMOC) that an incorrect tail number had been entered into the fuel system in Utah.

¶ 21 According to Officer Lindley, he received through AMOC the information regarding the anonymous source. He learned from AMOC that the source had walked up to the plane and spoken to the two occupants, who told the source that they were flying from Kansas to Lake Tahoe. The source reported seeing all but one window covered by curtains and several large duffel bags stacked in the plane. Officer Lindley admitted that he did not include all of the information in his affidavit.

¶ 22 The court took judicial notice of section 4-1-20(3) of the AIM. See AIM, § 4-1-20(3) (eff. Apr. 3, 2014), *available at* https: //www.faa.gov/air_traffic/publications/media/AIM_Basic_ 4-03-14.pdf (last visited Jan. 5, 2017). That section provided, in pertinent part, that a transponder must be operated only while in controlled airspace. Officer Lindley admitted that he was not aware of that provision.

¶ 23 In denying the motion to reconsider, the court found that there was no basis to change its initial ruling regarding the lack of a substantial basis for probable cause. As for the issue of good faith, the court initially found that the issuing judge had not wholly abandoned his judicial role and that there was no question that the warrant particularly described the place to be searched. The court also never specifically ruled that Officer Lindley provided information in his affidavit that he knew, or should have known, was false. The court did note, however, that it was concerned as to whether Officer Lindley was "forthright" in stating that a transponder must be operating at all times, when the AIM indicated otherwise. Thus, the court did not consider the information in the affidavit regarding the transponder when deciding whether there was a good-faith reliance on the warrant. The court further found that a reasonable officer could not rely on the information from the anonymous source, as it had not been corroborated. After finding that the only facts upon which a reasonable officer could rely were the plane's departure from a

known drug area, the entry of the incorrect tail number when refueling, and the suspicious behavior of Peterson, the court ruled that an officer could not have believed reasonably that there was sufficient probable cause to support the warrant. The State filed a certificate of impairment (see Ill. S. Ct. R. 604(a)(1) (eff. Dec. 3, 2015)) and a timely notice of appeal.

¶ 24 II. ANALYSIS

¶ 25 On appeal, the State contends that: (1) there was a substantial basis for the issuing judge to conclude that there was probable cause for a search warrant; and (2) even if there was not a substantial basis for probable cause, Officer Lindley relied in good faith on the search warrant. Defendant responds that: (1) there was not a substantial basis for probable cause to support the warrant; (2) the State forfeited the good-faith exception when it raised it for the first time in a motion to reconsider; and (3) even if the State did not forfeit the good-faith claim, the exception did not apply, because Officer Lindley recklessly or intentionally misrepresented the facts in his affidavit or because the affidavit lacked sufficient indicia of probable cause such that it was unreasonable for Officer Lindley to rely on the warrant.[2] The State replies that it did not forfeit the good-faith issue, as it raised it below and the court ruled on that issue.

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[2] The State filed a motion to strike defendant's reference to, and argument based upon, *People v. Franklin*, 2013 IL App (1st) 110505-U, and defendant's argument regarding a document from the McHenry County sheriff's office that was never made part of the record in, or considered by, the court below. On December 6, 2016, we granted the State's motion to strike as to the *Franklin* order but did not rule on the motion regarding the sheriff's office document. We now grant the motion to strike the argument based upon the document, as it was never made part of the record below or considered by the trial court. See *People v. Alvarez-Garcia*, 395 Ill. App. 3d 719, 726 (2009) (citing *Jenkins v. Wu*, 102 Ill. 2d 468, 483-84 (1984)).

¶ 26 We first address the issue of whether there was a substantial basis for the issuing judge to find that there was probable cause to issue the search warrant. There was. The existence of probable cause for a search warrant depends upon the totality of the circumstances. *People v. Brown*, 2014 IL App (2d) 121167, ¶ 22 (citing *People v. Tisler*, 103 Ill. 2d 226, 237-38 (1984)). A showing of probable cause means that the facts and circumstances within the knowledge of the affiant are sufficient to warrant a person of reasonable caution to believe that an offense has occurred and that evidence of it is at the place to be searched. *Brown*, 2014 IL App (2d) 121167, ¶ 22. At a probable-cause hearing, the court must make a practical, commonsense assessment of whether, given all of the circumstances set forth in the affidavit, there is a fair probability that evidence of a particular crime will be found in a particular place. *Brown*, 2014 IL App (2d) 121167, ¶ 22 (citing *People v. Hickey*, 178 Ill. 2d 256, 285 (1997)).

¶ 27 An after-the-fact assessment of the sufficiency of a probable-cause affidavit should not be done *de novo*. *Brown*, 2014 IL App (2d) 121167, ¶ 23 (citing *Illinois v. Gates*, 462 U.S. 213, 236-37 (1983)). Instead, an issuing court's determination of whether probable cause existed should be given great deference by a reviewing court. *Brown*, 2014 IL App (2d) 121167, ¶ 23; see also *Massachusetts v. Upton*, 466 U.S. 727, 732-33 (1984). That is so because a broader review would be inconsistent with the fourth amendment's strong preference for searches to be conducted pursuant to a warrant. *Brown*, 2014 IL App (2d) 121167, ¶ 23. Reflecting such a preference for the warrant process, the applicable standard of review of an issuing court's probable-cause determination is whether the court had a substantial basis for concluding that a search would uncover evidence of wrongdoing. *Brown*, 2014 IL App (2d) 121167, ¶ 23. Thus, if the affidavit provided a substantial basis for the issuing court to conclude that probable cause existed, the trial court must deny a motion to quash and suppress. *Brown*, 2014 IL App (2d)

121167, ¶ 23. An appellate court likewise must apply the substantial-basis standard to its review of the issuing court's determination. *Brown*, 2014 IL App (2d) 121167, ¶ 23; see also *People v. Bryant*, 389 Ill. App. 3d 500, 516 (2009).

¶ 28 In this case, there were essentially six factual assertions in the affidavit. First, the plane departed from an area known by law enforcement to be a source for cannabis production and drug smuggling. Second, the plane operated with an intermittent transponder, which indicated that it was attempting to evade law enforcement detection. Third, when the plane refueled in Utah, the pilot entered an incorrect tail number. Fourth, when the CBP helicopter illuminated the plane and hangar, two men hastily pushed the plane into the hangar and then left very quickly. Fifth, an anonymous source reported that, while the plane was being refueled, all but one of the curtains on the plane were closed and there were large duffel bags stacked to the windows of the cabin. Sixth, a man who exited the hangar drove his vehicle around the airport for about an hour, and when stopped he denied that he had been at the airport and lied about not knowing where it was.

¶ 29 Defendant contends that the information provided via the anonymous source could not properly be considered in assessing probable cause. We agree. When an affidavit relies on anonymous information, the court must consider, under the totality of the circumstances, the degree of reliability and basis of knowledge of the informant. *Gates*, 462 U.S. at 233. To that end, a barebones assertion that an officer has received reliable information from a credible informant is inadequate. *Gates*, 462 U.S. at 239. Instead, such information must be reasonably corroborated by other matters within the officer's knowledge. *Gates*, 462 U.S. at 242.

¶ 30 Here, the affidavit's reference to the anonymous source was barebones and conclusory. There was no indication that Officer Lindley made any effort to corroborate the information

purportedly provided by the informant. For example, there was no independent verification that the curtains were closed or that duffel bags were stacked up in the cabin. Nor was there any indication of the informant's basis of knowledge, such as how he came to observe the plane or the interior of the cabin.[3] Absent some meaningful corroboration of the anonymous source, the issuing court should not have relied on the anonymous information in assessing whether probable cause existed.

¶ 31 Having said that, we note that the information provided by the anonymous source was not particularly incriminating. The mere facts that the curtains were closed and that there were duffel bags in the airplane cabin were not particularly strong evidence of illegal activity. Therefore, elimination of those facts did not preclude a finding that there was a substantial basis for probable cause.

¶ 32 Indeed, the remaining facts provided a substantial basis for probable cause. The fact that the plane operated an intermittent transponder, combined with Officer Lindley's assertion that a pilot who turns a transponder on and off might do so to evade detection, reasonably implied that the pilot in this case was attempting to avoid detection, which indicated that he was engaged in criminal activity.

¶ 33 Additionally, the plane had departed an area known by law enforcement as a source for cannabis production and drug smuggling. Travel to and from a well-known source of illegal

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[3] We note that, at the hearing on the motion to quash and suppress, Officer Lindley testified that he learned via AMOC that the source had walked up to the plane and spoken to the two occupants. In doing so, the source observed the curtains and the duffel bags. That explanation, however, was not in the affidavit, nor is there any indication that Officer Lindley testified to that effect before the issuing court.

drugs may be considered in assessing probable cause for a warrant. See *Gates*, 462 U.S. at 243 (travel to Florida, a well-known source of illegal drugs, is relevant to probable cause). Therefore, the location of the plane's departure indicated illegal drug activity.

¶ 34 Further, the pilot entered a substantially incorrect tail number into the fueling system in Utah. That reasonably could be inferred as an effort to avoid detection, which in turn implied criminal activity.

¶ 35 Once the plane landed at Galt Airport and was illuminated by the CBP helicopter, two men hastily put it in the hangar and very quickly departed. Although the trial court questioned Officer Lindley as to what he meant by the use of those terms, a reasonable interpretation was that, upon being detected by the helicopter, the two men hurried to hide the plane and make their getaway. Of course, that reasonably could be viewed as incriminating behavior.

¶ 36 Perhaps most incriminating was Peterson's behavior. He departed the hangar, entered a vehicle, and then drove around the airport for about an hour. That was extremely suspicious under the circumstances. Moreover, when he was stopped, he blatantly lied to the officers about not knowing where the airport was and about not having been at the airport. Peterson's suspicious behavior and deceitful conversation were significant evidence that the plane was connected to criminal activity.

¶ 37 Even eliminating the anonymous information from the probable-cause equation, there were ample independent facts that provided a substantial basis for the issuing court to conclude that there was probable cause to believe that illegal drugs would be found in the hangar or the plane. Thus, the trial court erred in concluding otherwise.

¶ 38 Alternatively, we address whether, even if there was not a substantial basis for probable cause, Officer Lindley relied in good faith on the search warrant. Before doing so, however, we

must decide whether the State forfeited that issue by raising it for the first time in its motion to reconsider.

¶ 39 We note that an argument raised for the first time in a motion to reconsider in the trial court is forfeited on appeal. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36. However, forfeiture can be forfeited. *People v. De La Paz*, 204 Ill. 2d 426, 433 (2003).

¶ 40 Here, although defendant raised forfeiture in his written response, he did not raise it at the hearing. Instead, he stood silent as the trial court ruled only on the merits. Therefore, having failed to press his forfeiture argument below, he cannot do so on appeal. Thus, we will consider the State's good-faith contention.

¶ 41 The good-faith exception for reliance on a warrant was first announced in *United States v. Leon*, 468 U.S. 897 (1984). It allows the admission of evidence obtained by an officer acting in good-faith reliance on a search warrant that, although ultimately found to be unsupported by probable cause, was obtained from a neutral and detached judge, was free of obvious defects other than nondeliberate errors in preparation, and contained no material misrepresentations. *People v. Beck*, 306 Ill. App. 3d 172, 180 (1999) (citing 725 ILCS 5/114-12(b)(1), (b)(2) (West 1996)). The exception does not apply in four situations: (1) where the issuing judge was misled by information in the affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) where the issuing judge wholly abandoned his judicial role; (3) where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence unreasonable; and (4) where the warrant was so facially deficient that the executing officer reasonably could not presume it to be valid. *Beck*, 306 Ill. App. 3d at 180. If the officer who provided the affidavit did not possess an objectively reasonable belief in the existence of probable cause, then the good-faith exception does not apply. *People v. Rojas*,

2013 IL App (1st) 113780, ¶ 21. Although we assess whether the trial court's factual findings as to an officer's good faith were against the manifest weight of the evidence, we review *de novo* the legal ruling as to whether, under the facts, the good-faith exception applies. *People v. Turnage*, 162 Ill. 2d 299, 305 (1994).

¶ 42 In this case, defendant contends that Officer Lindley could not in good faith rely on the search warrant, because he intentionally or recklessly misrepresented facts regarding the use of the plane's transponder. We disagree.

¶ 43 Officer Lindley stated in his affidavit that the transponder was operated intermittently. There is nothing in the record to show that that assertion was false.

¶ 44 More importantly, he averred that a transponder should be on at all times and that pilots who turn it on and off might do so to avoid detection by law enforcement. In the affidavit, he based that assertion on his training and experience, as well as on what he had learned from "other law enforcement sources." At the hearing on the motion to quash and suppress, he testified that, although he had been trained in air interdiction for narcotics, he was unfamiliar with the AIM, including its provisions regarding the use of transponders. He also admitted that he never received any training in the use of transponders. According to Officer Lindley, he had learned from a CBP pilot that a transponder must be on at all times.

¶ 45 That Officer Lindley was unfamiliar with the AIM does not show that he intentionally or recklessly falsified his assertions that a transponder must be on at all times and that pilots who turn it on and off might do so to avoid detection. It was not unreasonable for him to have relied upon a CBP pilot for information regarding transponders. Although he did not specify in his affidavit that the information came from a CBP pilot, he did indicate that it came from law enforcement sources. In light of his reasonable reliance on the CBP pilot, he was not required to

have researched documents, such as the AIM, to determine further whether there were other requirements related to the use of a transponder. At most, Officer Lindley might have been negligent in not checking further before including his assertions regarding transponder use, but there was no evidence that he intentionally or recklessly falsified that information.[4]

¶ 46 Defendant alternatively maintains that Officer Lindley could not rely in good faith on the search warrant because his affidavit lacked sufficient indicia of probable cause. As the affiant, however, Officer Lindley had an objectively reasonable basis to believe that probable cause existed. Although, for reasons already discussed, it was not reasonable for him to have believed that the anonymous informant was reliable, as there were ample independent facts supporting probable cause. As noted, the location of departure, the intermittent use of the transponder, the entry of an incorrect tail number, the suspicious behavior of the two men at the hangar, and Peterson's incriminating conduct collectively provided Officer Lindley with an objectively reasonable basis to believe that there was probable cause to support the search warrant. Thus, the good-faith exception applied.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we reverse the judgment of the circuit court of McHenry County and remand for further proceedings.

¶ 49 Reversed and remanded.

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[4] We note that the trial court never expressly found that Officer Lindley intentionally or recklessly falsified his assertions about the transponder. At most, the court stated that it was concerned whether he was "forthright" in that regard. To the extent that the court found that Officer Lindley intentionally or recklessly falsified his assertions regarding the use of the transponder, that finding was against the manifest weight of the evidence.