2018 IL App (2d) 160925-U
No. 2-16-0925
Order filed May 3, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 16-CF-103
SALVADOR PEREZ,	)	Honorable Brian F. Telander,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in quashing a search warrant and suppressing the resulting evidence, as the complaint established probable cause to believe that, defendant's denials aside, he had a functional home surveillance system that would have recorded evidence of two nearby gun crimes.

¶ 2 A handgun and ammunition were found in the home of defendant, Salvador Perez, during the execution of a search warrant. Defendant was charged with unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2016)) and possession of a stolen firearm (720 ILCS 5/24-3.8(a) (West 2016)). Defendant moved to quash the warrant and suppress evidence recovered during the search. He argued that the warrant was issued without probable cause. The

State responded that the warrant was supported by probable cause. The State alternatively argued that, under the good-faith exception to the exclusionary rule (see *United States v. Leon*, 468 U.S. 897 (1984)), the evidence should not be suppressed. The trial court initially denied the motion. Although the court found that probable cause was lacking, the court concluded that the good-faith exception applied. However, on defendant's motion to reconsider, the court ruled that the good-faith exception did not apply. The State now appeals. We reverse and remand.

¶ 3 According to the complaint for the search warrant, on December 20, 2015, two West Chicago police officers responded to a report of possible shots fired. They determined that the incident occurred in the area of 404 East Blair Street and 408 East Blair Street. Several bullets and casings were found on the driveway shared by the homes at those addresses. Paula Newlin, who resided at 408 East Blair Street, reported that there had been several Hispanic males drinking near a bonfire in the backyard of 404 East Blair Street. Newlin indicated that, after hearing a man in the driveway screaming in Spanish, she then heard what she believed were gunshots. The following day, two West Chicago police officers spoke to defendant through a window at 404 East Blair Street. Defendant refused to come to the door. The officers asked defendant about the incident and whether his surveillance system was operational. Defendant told the officers that the cameras were only for show and that the surveillance system was not operational.

¶ 4 On January 1, 2016, West Chicago police officers responded to a report of a shooting on East Blair Street. The officers spoke with Nataly Cholula, who related that she had driven to 322 East Blair Street to drop off one of the passengers in her vehicle. While the passenger was exiting the vehicle, Cholula heard yelling and arguing coming from east of her location (from the direction of 404 E. Blair Street). She then heard several loud noises that she believed to be

gunshots. A vehicle accelerated toward Cholula's stopped vehicle and passed it at a high rate of speed. Cholula and her passengers ducked and were unable to provide a detailed description of the vehicle. An evidence technician found a "large previously fired projectile" in the door panel of Cholula's vehicle. Police officers spoke with several residents of the area where the incident occurred. The residents reported hearing what they believed were several gunshots. One resident reported observing several Hispanic males who were bent over at the waist and who appeared to be looking for something in the driveway shared by the residences at 404 East Blair Street and 408 East Blair Street. Other residents reported hearing yelling and screaming before the gunshots were fired. Officers observed several individuals entering and exiting the residence at 404 East Blair Street.

¶ 5 Officers spoke with defendant, who denied knowledge of the incident. Defendant indicated that he had just returned home. An officer later observed damage to a Jeep Grand Cherokee that belonged to defendant and was parked in the driveway at 404 East Blair Street. Its rear window had been broken out and there was a large hole in its windshield. The officer believed that the damage was caused by a bullet. The officer found a bullet in the back of the property at 404 East Blair Street. The bullet had struck a fence and fallen to the ground. A detective spoke with defendant, inquiring whether a video surveillance system attached to his home was functional. Defendant said that it was not.

¶ 6 On January 11, 2016, a police officer located a stolen Chevy TrailBlazer in the driveway at 404 East Blair Street. The vehicle had crashed into defendant's Jeep Grand Cherokee. A detective spoke with defendant on January 12, 2016, again inquiring whether the surveillance system was working. Defendant responded that it was, but he refused to permit the detective to check the surveillance system to determine whether it had captured images of the driver of the

stolen vehicle. Defendant said that he would check the system himself. Defendant later told the detective that he had found footage of the incident. Defendant's sister transferred the video recording to her cell phone and sent the video to the detective's cell phone. On January 14, 2016, Judge Paul Marchese issued the search warrant at issue in this appeal. It authorized the seizure of:

> "Any and all computers ***; any and all magnetic or optical media, including but not limited to hard disk drives, floppy disks, compact discs, DVD's, USB storage devices, digital memory cards, and any and all passwords or other computer security devices, and any and all information and data stored in the form of magnetic or electronic coding on computer media or on media capable of being read by a computer or with the aid of computer equipment or on a digital video recorder; and any and all passwords or other computer or digital video recorder security devices; any and all computer software or digital video recording software or digital audio recording software; any and all evidence of dominion and control over said digital recorder and recording system; any and all evidence relating to the transmission or re-transmission of digital images, video or audio recordings recorded at 404 E. Blair St., West Chicago, IL; and any and all information pertaining to dates and times of access to the digital video recorder and recording system including digital video cameras located both in and affixed to the exterior of the residence."

¶ 7 As noted, the trial court initially denied defendant's motion to quash and suppress but later granted defendant's motion to reconsider. The State filed a timely notice of appeal.

¶ 8 The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV. "Probable cause" has been described as follows:

> "[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' [citation], that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Texas v. Brown*, 460 U.S. 730, 742 (1983).

¶ 9 Our review of the validity of the warrant is governed by the following principles:

> "[T]his court's task is to focus on the magistrate's initial determination of probable cause, as opposed to the trial court's review of that determination. [Citation.] In construing an affidavit for a search warrant, this court must not substitute its judgment for that of the magistrate, but rather, decide whether the magistrate had a substantial basis to conclude that probable cause existed. [Citation.] The United States Supreme Court has indicated that 'after-the-fact scrutiny by [the] courts of the sufficiency of an affidavit should not take the form of *de novo* review.' " *People v. Smith*, 372 Ill. App. 3d 179, 181-82 (2007) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

The determination that there was probable cause for the issuance of a warrant should not be disturbed on review unless it is manifestly erroneous. *People v. Phillips*, 336 Ill. App. 3d 1033, 1035 (2003). "Manifestly erroneous means arbitrary, unreasonable and not based on the evidence." *People v. Wells*, 182 Ill. 2d 471, 481 (1998).

¶ 10 The State argues that the complaint for a search warrant set forth sufficient facts to establish probable cause to believe that surveillance footage containing evidence of gun crimes would be found in defendant's home. According to the State, it was reasonable to infer that defendant was untruthful when he claimed that the surveillance camera was not working when those crimes occurred. The State contends that the trial court did not take a common-sense approach to evaluating probable cause and did not properly defer to the determination of probable cause by Judge Marchese, who issued the warrant.

¶ 11 Defendant responds that the complaint for the search warrant did not set forth facts tending to show that there was video surveillance footage of the December 20, 2015, and January 1, 2016, incidents. Defendant notes that no suspects were identified in connection with either incident and that there were no witnesses who saw anything unusual when shots were reportedly fired on December 20, 2015. Furthermore, there were no reports of injuries or property damage. Although bullets and shell casings were found in the driveway defendant shared with his neighbor, defendant contends that "not one person was able to offer information as to where they came from, how they got to the driveway and how long they had been there." Defendant contends that the January 1, 2016, incident, which apparently involved a drive-by shooting, occurred a block away from defendant's home. According to defendant, "it's difficult to conceive of any set of circumstances that would result in the production of a video recording containing evidence of the incident occurring a block away." Defendant points out that no witness identified the vehicle or the perpetrators involved in the shooting. Although there was damage to defendant's vehicle—which was parked in the shared driveway—defendant contends that there was no evidence to connect the damage to the shooting.

¶ 12 We agree with the State and, for several reasons, we find defendant's arguments unpersuasive. First, the absence of property damage or injuries in connection with the December 20, 2015, incident does not mean that no crime was committed on that date. Furthermore, the absence of witnesses who *saw* shots fired on either December 20, 2015, or January 1, 2016, does not mean that the surveillance equipment captured no evidence of a crime.

¶ 13 Second, the discovery of bullets and shell casings in the driveway is circumstantial evidence that Newlin did, in fact, hear gunshots coming from the driveway. It is true that the bullets and shell casings *might* have been left in the driveway on another occasion. Were the State required to prove beyond a reasonable doubt—or even by a preponderance of the evidence—that the bullets and shell casings were connected to the gunshots Newlin thought she heard, the State would not be able to meet its burden. However, showing probable cause entails a lesser burden. *Gates*, 462 U.S. at 235 ("Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision [to issue a warrant].").

¶ 14 Third, although Cholula's vehicle was about a block from defendant's home when it was struck by a bullet, Cholula heard yelling coming from *east* of her location. Cholula's vehicle was located to the west of defendant's home. After hearing yelling, Cholula heard gunshots. Defendant's own vehicle had damage consistent with being struck by a bullet. Accordingly, it is probable that the shooting occurred near defendant's home and that surveillance footage from defendant's camera would show evidence of a crime.

¶ 15 Defendant argues that "the uncontroverted evidence *** was that the video surveillance system was NOT operational" on either December 20, 2015, or January 1, 2016. That "uncontroverted evidence" consists merely of defendant's statements that the surveillance

camera was "just for show" and, later, that the camera did not work. The camera was working on January 11, however, but defendant permitted the police to view only a clip of surveillance footage, which he provided. Given that the camera was operational on January 11 and defendant's reluctance to afford the police access to surveillance footage, the judge who issued the search warrant was entitled to discount defendant's claims that the camera was "for show" and did not work.

¶ 16 Defendant also argues that the police should have conducted a more thorough investigation before seeking a search warrant. Defendant contends that the police should have asked him why the surveillance system was functional on January 11, 2016, when he had claimed that it was not functional on December 20, 2015, and January 1, 2016. Defendant observes that "the search warrant complaint is completely devoid of any mention or suggestion that there was a follow-up discussion with [defendant], *or any other person*, regarding the functionality and capabilities of the surveillance cameras." (Emphasis in original.) The argument is meritless. One claiming a fourth-amendment violation cannot defeat a finding of probable cause by arguing that the police should have asked for his or her side of the story. *Cf.* 2 Wayne R. LaFave, Search and Seizure § 3.2(d), at 56 n. 119 (4th ed. 2004) (and cases cited therein) (police need not get suspect's side of the story when witness accounts supply probable cause for arrest). Moreover, defendant does not identify "any other person" who would have been able to establish whether the surveillance system was functioning on December 20, 2015, or January 1, 2016.

¶ 17 In view of the foregoing, we conclude that the determination of probable cause by the judge who issued the warrant was not manifestly erroneous. The trial court therefore erred in granting defendant's motion to suppress. Given that conclusion, we need not consider whether

the good-faith exception would otherwise apply here. We therefore reverse the judgment of the circuit court of Du Page County and remand the case.

¶ 18 Reversed and remanded.