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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY DUKE,

Defendant and Appellant.

A134692

(Sonoma County  
Super. Ct. No. SCR597489)

Defendant Michael Anthony Duke appeals from a final judgment and sentence entered after a plea of no contest, on the ground that the trial court committed reversible error in denying his motion to quash a search warrant and suppress the drug evidence seized pursuant to that warrant. We affirm the judgment.

**BACKGROUND**

In May 2011, the Sonoma County District Attorney filed an information charging defendant with one count each of unlawful importing and transporting controlled substances (Health & Saf. Code, § 11352, subdivision (a)); unlawfully possessing a firearm (former Pen. Code, § 12021, subd. (a)(1)); and unlawfully possessing ammunition (former Pen. Code, § 12316, subd. (b)(1)). The information also alleged that defendant had a prior narcotics conviction that rendered him ineligible to own or possess firearms (former Pen. Code, §§ 12021, 12021.1; Welf. & Inst. Code, §§ 8100, 8103; Health & Saf. Code, § 11377). Defendant pleaded not guilty to all counts and denied prior conviction allegation.

Defendant was arrested at his Santa Rosa, California residence after police searched the residence pursuant to a search warrant and seized apparent controlled substances and firearms. After the information was filed, defendant filed a motion pursuant to Penal Code section 1538.5, subdivision (a)(1)(B)(iii) to quash the search warrant and suppress the evidence seized, contending there was no probable cause for the magistrate's issuance of the search warrant. The trial court denied the motion.

Defendant subsequently withdrew his not guilty plea, entered a plea of no contest to unlawful possession of a firearm and unlawful possession of ammunition, and admitted the truth of the prior conviction allegation. The court granted the People's motion to dismiss the remaining count for the unlawful importing and transporting of controlled substances subject to a "*Harvey* waiver," which permits a court to consider the facts underlying dismissed counts in determining sentence pursuant to *People v. Harvey* (1979) 25 Cal.3d 754. The court found the preliminary hearing transcript was a factual basis for defendant's plea.

The court granted defendant three years of probation, subject to a number of conditions, including related to the possession and use of controlled substances and random chemical testing.

Defendant filed a timely notice of appeal.

## **DISCUSSION**

Defendant argues the trial court prejudicially erred when it denied his motion to quash the search warrant and suppress the evidence subsequently seized because the warrant was issued without probable cause. We conclude the trial court did not err.

### ***I. The Proceedings Below***

#### ***A. Detective Hepp's Statement of Probable Cause***

At the center of this appeal is the "statement of probable cause" submitted by Detective Ryan Hepp of the Santa Rosa Police Department in support of the search warrant, which was submitted to the court after review by a deputy district attorney. After stating his experience in conducting over 50 narcotics-related investigations, including investigations regarding the packaging and transportation of narcotics and

dangerous drugs, Hepp indicated that on February 8, 2011, he received information that an internationally shipped package containing contraband had been confiscated by the United States Customs and Border Protection Agency (Customs) at the Los Angeles International Airport (LAX). Hepp spoke the next day to Customs Officer Schag, who told Hepp that a few days before, while working at a Customs international mail facility, Schag had noticed a package made of white cardboard that had been shipped from Thailand via the United States Postal Service and addressed to defendant at a Santa Rosa address.

Schag also told Hepp the following: All packages received from Thailand receive extra scrutiny. Based on his own experience, Schag thought it was common for items of contraband, including controlled substances, to be shipped from Thailand black markets to United States addressees. The package indicated it contained office materials, including stationary and paper clips but, based on an x-ray, it appeared to contain a large quantity of pills or tablets. Schag opened the package to find two bags containing a total of 957 blue-colored pills labeled "Roche 10," and later determined from a check of an online drug information website, "www.drugs.com," that the pills were likely a form of Valium. He also found several sheets of carbon paper inside the package. Schag said it was common for people attempting to import and mail illegal contraband to use carbon paper to line the interior walls of the package in the belief that it would cause a package to bypass x-ray machine security checks.

Hepp stated his belief that defendant used mail or online correspondence to facilitate the purchase of contraband pills. Hepp further stated that a Department of Homeland Security agent, Robert Winn, picked up the package at the Customs mail facility, sealed it, and shipped it overnight by Federal Express to the San Francisco Department of Homeland Security office. Winn told Hepp that he had learned from conversations with Customs agents that defendant had previously received approximately six or seven notices of seizure from Customs because of seized contraband items that he had attempted to import illegally into the United States.

Hepp stated that an agent delivered the package to him on February 10, 2011. Hepp saw two large baggies inside the package that contained blue tablets, which were inscribed, "roche 10." He searched for this tablet on a website, "www.pharmer.org," and learned its generic name was "diazepam" and its trade name was "Valium." He knew from his training and experience that Valium was a prescription medication and a sedative.

Hepp stated his belief that defendant was violating Health and Safety Code section 11351 by possessing this contraband. The package was from Thailand and indicated it contained office materials. Hepp knew from his training and experience that drug traffickers can obtain illegal narcotics, including prescription drugs, from foreign suppliers via mail, email, or online correspondence. Furthermore, based on information about typical adult dosages for Valium from www.drugs.com, the tablets he found would be more than a year's supply for an adult. Therefore, he stated, he intended to conduct a controlled delivery of the package via the United States Postal Service and sought a search warrant that would only be used upon acceptance of the package by defendant or someone acting on his behalf. Hepp asked for permission to search for and seize narcotics and firearms, among other things.

The court issued an anticipatory warrant for the search of defendant's residence.

#### ***B. Detective Hepp's Preliminary Hearing Testimony***

Detective Hepp also testified at defendant's preliminary hearing. His testimony repeated information contained in his statement of probable cause. Hepp further testified that he arranged a controlled delivery of the package by a United States Postal Service agent on February 14, 2011. Defendant's wife signed for the package at defendant's residence. Hepp and other law enforcement officials maintained surveillance for 10 minutes, during which time no one came to or went from the residence, and then served the search warrant. After they provided "knock and notice," defendant answered the door carrying hundreds of blue-colored pills in a paper in his hand. Defendant said, "I did not want these," referring to the pills in his hand.

According to Hepp, detectives and federal agents, after securing the residence (defendant, his wife, and daughter were present), conducted a systematic search of the residence. They found a .20-gauge Stevens shotgun in defendant's bedroom, .20 gauge shotgun ammunition, and .22 caliber ammunition. They also found the package that was delivered, opened, as well as "numerous pills of different types and colors and quantities," including over 3,000 pills of the "blue Valium type."

Hepp stated that the Department of Justice's Bureau of Forensic Science determined the pills were diazepam, a form of Valium, and that diazepam was an accurate description of the items delivered to defendant. The parties stipulated that, for the purposes of the hearing, other drugs, including hydrocodone and oxycodone were found at defendant's residence.

Hepp testified that defendant admitted to him that he had tried to obtain Valium through the mail, and "had been in contact through various Internet websites asking . . . for information in receiving pills, prices, [and] price lists for the pills that those particular websites offered." Defendant described having conversations with online retailers about purchasing large quantities of pills. He did not admit to ordering the quantities he had received, but did admit to making requests and orders for smaller quantities of pills, and to having received such pills.

The People also introduced without objection, a certified copy of defendant's prior conviction for violating Penal Code section 11377, subdivision (a).

At the end of the preliminary hearing, the court found sufficient evidence had been presented to believe that defendant committed the offenses charged and had a prior conviction for violating Penal Code section 11377, subdivision (a).

### ***C. The Court's Ruling on Defendant's Motion***

In his motion to quash/suppress, defendant challenged the issuance of the search warrant and moved to suppress all items seized on the grounds that Hepp's statement of probable cause failed to establish sufficient probable cause to support issuance of the warrant. Defendant further argued that the evidence should not be allowed in under the good faith exception allowed to officers who act in reasonable reliance on a search

warrant because the People did not show the hearsay evidence relied on by Hepp was reliable, nor that it was reasonable for Hepp or Schag to rely on two internet websites to identify the tablets found in the package as illegal contraband.

At the conclusion of the hearing on defendant's motion, the trial court found sufficient probable cause to support the issuance of the warrant. The court also determined that even if such probable cause did not exist, the police relied in good faith on the validity of the warrant. The court ruled:

“So the motion's denied. The search warrant is presumed valid, and the burden's on the defendant to establish that the warrant is invalid or was unlawfully executed. And in this case, the search warrant probable cause statement is very detailed; and in the totality of the circumstances that are presented in the probable cause statement, there is more than ample probable cause to issue the warrant. And the warrant was properly executed, and the officers relied in good faith on the warrant's validity, and the court sees no—there's just, the burden's not met to show that there's, that the warrant's invalid.”

## **II. Analysis**

### **A. Probable Cause**

We review issues relating to the suppression of evidence derived from governmental searches under federal Constitutional standards. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. 8.) “The requirement that, ‘no warrants shall issue, but upon probable cause,’ (U.S. Const., 4th Amend.) has been the law of this land since at least 1791 . . . .” (*People v. Gotfried* (2003) 107 Cal.App.4th 254, 266.) In determining whether such probable cause existed for issuance of a search warrant, we review the totality of the circumstances. (*Illinois v. Gates* (1983) 462 U.S. 213, 230-231, 238 (*Gates*).)

The probable cause standard “is a ‘practical, nontechnical conception.’ [Citation.] ‘In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’ ” (*Gates, supra*, 462 U.S. at p. 231.) “[P]robable cause is a fluid concept—turning on the assessment of

probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. (*Id.* at p. 232.) “ ‘The process does not deal with hard certainties, but with probabilities.’ ” (*Id.* at p. 231.) “The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” (*Id.* at p. 238.)

Defendant bears the burden of establishing a basis for quashing a search warrant because courts “have a ‘strong policy favoring search by warrant rather than upon other allowable basis.’ [Citations.] For this reason, when . . . the police do obtain a warrant, that warrant is presumed valid.” (*People v. Amador* (2000) 24 Cal.4th 387, 393.)

As for our standard of review, “[t]he question facing a reviewing court . . . is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1040.) “ ‘[W]e defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.’ ” (*People v. Carrington* (2009) 47 Cal.4th 145, 166.) Our resolution of doubtful or marginal cases is “ ‘largely determined by the preference to be accorded to warrants’ [citation]. This reflects both a desire to encourage the use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.” (*Gates, supra*, 462 U.S. at p. 237, fn. 10.)

In the present case, we need not determine whether there was probable cause for the issuance of the search warrant because we agree with the trial court that in any event, the search was conducted based on the officers’ good faith reliance on the search warrant. We turn now to this issue.

## **B. *The Officers' Good Faith Reliance on the Search Warrant***

The “good faith exception” exists in recognition of the underlying purpose of the exclusionary rule. “ ‘If the purpose . . . is to deter unlawful police conduct, the evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.’ ” (*United States v. Leon* (1984) 468 U.S. 897, 919 (*Leon*)). “This is particularly true . . . when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate’s responsibility to determine whether the officer’s allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate’s probable-cause determination or his judgment that the form of the warrant is technically sufficient.” (*Id.* at pp. 920-921, fn. omitted.)

In short, “[g]ood faith reliance exists if the agents’ affidavit establishes ‘at least a colorable argument for probable cause,’ and the agents relied on the search warrant in an objectively reasonable manner.” (*United States v. Shi* (2008) 525 F.3d 709, 731.) However, exclusion of evidence is not always “inappropriate in cases where an officer has obtained a warrant and abided by its terms. ‘[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness,’ [citation], for ‘a warrant issued by a magistrate normally suffices to establish’ that a law enforcement officer has ‘acted in good faith in conducting the search.’ [Citation.] Nevertheless, the officer’s reliance on the magistrate’s probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, [citation], and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.” (*Leon, supra*, 468 U.S. at pp. 922-923, fn. omitted.)

Thus, an officer does not manifest objective good faith “in relying on a warrant based on an affidavit ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’ ” (*Leon, supra*, 468 U.S. at p. 923.) A court’s

“good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.” (*Id.* at p. 922, fn. 23.)

Defendant argues that the officers did not have good faith reliance on the search warrant that was issued because it relied on Schag’s statements to Hepp that the pills were likely a form of Valium based on his check of an online drug information website, [www.drugs.com](http://www.drugs.com); Department of Homeland Security Agent Winn’s statements to Hepp that Customs agents had told him defendant had previously received approximately six or seven notices of seizure from Customs because of seized contraband items that defendant had attempted to import illegally into the United States; and Hepp’s own conclusions that the pills he found were Valium based on his own review of websites. Defendant argues that, given that there was no need under the circumstances for a “hurried judgment” by law enforcement because it had control of the package, Hepp should have known that it was necessary to take further steps to establish probable cause, including the need to corroborate the information he received and test the tablets he found.

Defendant’s argument is unpersuasive for a number of reasons. First, and most importantly, defendant ignores a substantial amount of evidence in support of probable cause that was described in some detail in Hepp’s statement of probable cause. This includes the report from Schag that, based on his own experience, it was common for controlled substances to be shipped from Thailand black markets to United States addressees and that such packages received extra scrutiny by Customs; that the package in question indicated it contained office materials when in fact it contained over 900 pills marked “Roche 10”; and that the package contained several sheets of carbon paper, which, Schag said, were used commonly by people attempting to import and mail illegal contraband in the belief it would cause a package to bypass x-ray machine security checks. Furthermore, Hepp himself inspected the package when he received it, confirmed it was mailed from Thailand and indicated it contained office materials, and that it contained two large baggies containing blue tablets inscribed as indicated by

Schag. Hepp's description of this physical evidence was specific and detailed, and he relied heavily on it in seeking the search warrant.

Defendant's failure to consider this significant physical evidence in his analysis renders it incomplete and unpersuasive. There was, for example, no such physical evidence in the cases relied on by defendant. (See *United States v. Weber* (9th Cir. 1990) 923 F.2d 1338, 1340, 1344-1346 [no probable cause or reasonable reliance where the affidavit, besides describing the government's own undercover scheme, described only that two years previously defendant had been sent advertising material, not delivered, described by a Customs agent as "apparently" child pornography]; *United States v. Weaver* (6th Cir. 1996) 99 F.3d 1372, 1375-1376, 1379-1380 [affidavit relying almost entirely on hearsay information from an informant and containing a paucity of particularized facts failed to provide sufficient factual evidence for a finding of probable cause, and there was no reasonable reliance on the issued warrant]; *United States v. Leake* (6th Cir. 1993) 998 F.2d 1359, 1361, 1367 [no reasonable reliance on a warrant issued based on an anonymous tipster's report that he had smelled and saw what seemed to be marijuana in the basement of a residence, the surveillance of which revealed nothing unusual].)

Second, we disagree with defendant that the circumstances do not indicate a lack of time pressure on law enforcement. While the issue was not raised by Hepp in his statement or by the People in this appeal, the circumstances nonetheless indicate that law enforcement discovered a package while it was in route via the postal service to defendant's residence. While law enforcement officials obtained control of the package and the delivery, these facts suggest they did so in the middle of a time frame of order and delivery that began prior to their assumption of control, and could reasonably have created some time pressure on them. This was not true in the case cited by defendant in support of his argument. (See *United States v. Weber, supra*, 923 F.2d at pp. 1340, 1346 [regarding the controlled delivery of child pornography ordered by defendant from an advertisement and distributor that were fictitious creations of the United States and Canada Customs Services].)

Third, while it would have been more effective for Hepp to provide further information to the magistrate about the reliability of the websites he identified, defendant does not establish that it was entirely insignificant that Hepp and Schag concluded from separate searches of the two different websites identified that the pills in the package were Valium.

Fourth, similarly, while it arguably would have been better practice for Hepp to independently corroborate the information Winn passed on to him about past notices sent to defendant from Customs, defendant nonetheless provides no persuasive reason why this hearsay evidence should not have been afforded some weight by the magistrate.

Fifth, as the People point out, Hepp’s statement of probable cause was reviewed by a deputy district attorney. (*People v. Camarella* (1991) 54 Cal.3d 592, 605, fn. 5 [in considering whether reliance was objectively reasonable, “[i]t is . . . proper to consider . . . whether the affidavit was previously . . . reviewed by a deputy district attorney”].)

In short, we conclude that the totality of these circumstances established a colorable argument for probable cause, and that the officers’ reliance on the warrant was objectively reasonable. Therefore, the trial court did not err in denying defendant’s motion.

**DISPOSITION**

The judgment is affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.