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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL IANNIELLO et al.,

Defendants and Appellants.

C068421

(Super. Ct. No. CRF100987)

Defendants Michael Ianniello and Carolyn Grimes pleaded guilty to possession of pseudoephedrine with intent to manufacture methamphetamine (Health & Saf. Code, § 11383.5, subd. (b)(1)) and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and were placed on probation. They appeal the denial of a motion to suppress evidence (Pen. Code, § 1538.5)¹ and denial of Proposition 36 probation for nonviolent drug possession offenses (§ 1210.1). Defendants contend (1) the affidavit in

¹ Undesignated statutory references are to the Penal Code.

support of a search warrant lacked probable cause, and (2) they were entitled to Proposition 36 probation because their crime was a nonviolent drug possession offense.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 2010, around 10:50 a.m., law enforcement officers executed a search warrant at defendants' home to search for evidence of a methamphetamine lab.² Upon entering, the officers noticed a strong chemical smell and saw items associated with a methamphetamine lab. They obtained a second search warrant and seized items including a book entitled *The Whole Drug Manufacturer's Catalog*, which contained information on how to manufacture methamphetamine; a substance later identified as methamphetamine; a portable electric burner; a bottle of hydrogen peroxide; a can of acetone; a bottle of drain opener; and "some" boxes of pseudoephedrine tablets. Ephedrine can be extracted from pseudoephedrine tablets and used to make methamphetamine. Detectives also saw several plastic soda bottles, containing unknown liquids, including one that contained a bilayered liquid solution commonly associated with manufacturing methamphetamine, and several glass jars that also contained unknown liquids.

On October 29, 2010, the prosecutor filed an information charging defendants with manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)), possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine (Health & Saf. Code, § 11383.5, subd. (b)(1)), and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)).

Defendants moved to suppress all evidence (§ 1538.5) on the grounds that the search warrant was not supported by probable cause, the execution of the warrant was

² The facts are taken from the transcript of the preliminary hearing, the stipulated factual basis for defendants' guilty pleas.

unreasonable, and the indefinite seizure of the residence was unconstitutional.

Defendants also moved to set aside the manufacturing count for lack of evidence.

(§ 995.)

The suppression motion attacked the deputy sheriff's affidavit of probable cause that was used to secure the April 2, 2010 search warrant. The affiant, Sheriff's Detective Robert Brokenbrough, described his extensive training and experience as a sheriff's deputy and detective since 1991, credentials which are not challenged by defendants. The affiant's statement of probable cause included the following:

Approximately two years before the April 1, 2010 affidavit, Brokenbrough was assigned to the Yuba/Sutter Narcotics Enforcement Team (NET-5) and received information from a "Confidential Informant" (CI), who "stated there was a possible methamphetamine lab at [defendants' residence and] that he/she knew that 'Michael' and 'Carolyn Grimes' lived at the residence. [¶] CI said he/she was willing to show [Brokenbrough] where Michael and Carolyn lived. CI provided [Brokenbrough] with the directions and pointed to [the address]. CI said he/she did not know the apartment number or letter, but said the apartment was the first apartment near the front of the apartment complex.^[3] [¶] CI said that he/she had been inside the apartment and he/she had seen 'a lot' of pills and blister packs on the counter. CI said that he/she was aware that Michael and Carolyn have other people pick up pseudoephedrine pills and Michael and Carolyn use these pills to manufacture methamphetamine. CI was unable to provide [Brokenbrough] with any further information. NET-5 agents conducted surveillance at the residence; however, no additional leads were obtained. [¶] Soon after giving [Brokenbrough] the above information, CI was deactivated and no longer used as an informant, and this case remained inactive."

³ At the preliminary examination, Brokenbrough described it as a duplex.

Brokenbrough's affidavit further stated that a records check confirmed defendants lived at the residence. Neither was on probation nor had any outstanding warrants. Law enforcement officers had had two prior contacts with Carolyn Grimes, the last being in 2000. In April 1999, Grimes was convicted of Health and Safety Code section 11377, subdivision (a), and sentenced to three years' probation and one day in jail. In November 2000, she was again convicted of Health and Safety Code section 11377, subdivision (a). She was sentenced to three years' probation and a fine. Ianniello did not have any drug convictions.

On December 21, 2009, Brokenbrough and another agent went to "different pharmacies" in the Yuba-Sutter area and obtained their Pseudoephedrine (PSE) Schedule V Transaction Logs for a one-month period from November 21 through December 21, 2009. The logs showed Grimes had produced her driver's license and provided her signature and purchased eight boxes of PSE pills between November 26 and December 17, 2009, as follows:

November 26 - one package containing forty-eight 60-mg. pills, 2.88 grams,
December 2 - two packages containing forty-eight 30-mg. pills, 2.88 grams,
December 4 - one package containing forty-eight 60-mg. pills, 2.88 grams,
December 4 - one package containing forty-eight 60-mg. pills, 2.88 grams,⁴
December 16 - two packages containing forty-eight 30-mg. pills, 2.88 grams, and
December 17 - one package containing forty-eight 60-mg. pills, 2.88 grams.

On March 29, 2010, Brokenbrough went to one Wal-Mart and two Walgreens pharmacies in Yuba City and obtained their PSE logs for the period from February 1, 2010 through March 28, 2010. Other pharmacies were not checked. The logs showed

⁴ The affidavit listed two purchases on December 4.

Grimes provided her driver's license and signature and bought seven boxes of PSE pills as follows:

February 9 - one package containing forty-eight 60-mg. pills, 2.88 grams,

February 9 - two packages containing forty-eight 30-mg. pills, 2.88 grams,

February 10 - two packages containing forty-eight 30-mg. pills, 2.88 grams, and

March 28 - two packages containing (count unknown) 30-mg. pills, 2.88 grams.

Brokenbrough further attested: "On 03-30-10, I spoke with the pharmacist at CVS Pharmacy in Yuba City. I provided the pharmacist with the name of the [PSE] packages, dates and the amounts purchased by Carolyn Grimes. The pharmacist told me that the normal dosage for a 30[-mg. PSE] pill is four pills within a 24[-]hour time period and the normal dosage for a 60[- mg. PSE] pill is two pills within a 24-hour time period. The pharmacist said that a person who suffers extreme allergies would use two or possibly three boxes of [PSE] pills in a one[-]month time frame."⁵

Brokenbrough reviewed the U.S. Department of Justice Drug Enforcement Administration Office of Diversion Control Combat Meth Act of 2005, which states, "Your customer cannot buy more **than 9 grams in a 30-day period** of [PSE]." (Boldface and underlining in affidavit.)

Brokenbrough also attested he reviewed this case with Special Agent Mitchell Fox of the California Department of Justice, Bureau of Narcotic Enforcement. Brokenbrough set forth Fox's expertise in the investigation of methamphetamine manufacturing.

⁵ The affiant added, "[t]he pharmacist said it was her opinion that whoever was buying that many pills was abusing the system and possibly 'smurfing' the pills." The affiant said, "Smurfing" is a street term used to describe the practice, by a person or a group of people, of purchasing small quantities of pseudoephedrine to be used in the manufacturing of methamphetamine." However, the trial court disregarded this portion of the opinion, both in issuing the warrant and in ruling on the suppression motion. We therefore need not address whether the pharmacist had the expertise to render this opinion.

Defendant does not challenge Fox's expertise. Fox opined "that Carolyn Grimes was buying [PSE] pills in excess and she was likely using the pills to manufacture methamphetamine."

In their suppression motion, defendants argued, (1) the informant's allegations were entitled to no weight since there was no information the informant was "anything other than a garden variety criminal" whose allegations were not verified, (2) the information was stale, (3) Grimes's recent purchases of cold medication did not provide probable cause, and (4) law enforcement's sealing of the residence for five months was excessive. On the first point, defendants argued: "The defense believes that the informant was/were criminals and that is how law enforcement contacted the informant. The informant could not have been as conversant with methamphetamine as the affiant describes unless he/she frequented the criminal underworld. This information including the prior criminal record should have been provided to the magistrate. The reason for the informant's deactivation should have been set forth in the affidavit. If the defense is correct, the informant is playing both sides of the street. Unless the informant has provided information that has been verified since his/her/their last arrest they are merely criminal informants, not confidential reliable informants. Moreover, the information was stale when it was set forth in the affidavit two years later."

At the hearing on February 18, 2011, the judge began by noting he was the magistrate who had issued the warrant.

After hearing oral argument, the trial court denied the suppression motion, stating the informant's information "was by itself stale and only was important at least to the officer requesting the warrant and to the magistrate, I presume to give some context to the more recent information about the purchase of the [PSE pills]. So the reason why the informant was no longer an informant is really not important because that information by itself does not independently establish probable cause." The court said that, in issuing the warrant, it had considered the pharmacist's opinion about normal dosage of cold

medication but had disregarded, and continued to disregard, the pharmacist's opinion as to what a person might do with excess amounts. The trial court said, "So . . . the real issue for me is . . . whether or not the most recent purchase on March the 28th of the two packages of pseudoephedrine does -- does establish probable cause under the totality of the circumstances. And in this Court's opinion it does. Taking into consideration the information from two years ago, even though it's from an informant whose history since that is unknown, but at that time that person was active as an informant said that these two people were involved in an activity that's then corroborated by the purchases which were observed in December of '09 and in February of 2010 and then the purchase on March the 28th, even though in a vacuum that is a legal purchase, certainly does lend itself to probable cause to believe that the conduct being suspected is ongoing, and that there may be some methamphetamine manufacturing taking place at that location. [¶] Each -- each little part by itself isn't enough, but as a whole, I do find that there was probable cause for the issuance of the warrant. And the Court denies the motion to suppress."

On February 23, 2011, defendants pleaded guilty to counts 2 and 3 -- possession of pseudoephedrine with intent to manufacture methamphetamine, and possession of methamphetamine. Count 1, manufacturing methamphetamine, was dismissed.

In May 2011, the trial court denied defendants' request for referral to drug court under Proposition 36, because possession of pseudoephedrine with intent to manufacture methamphetamine (Health & Saf. Code, § 11383.5, subd. (b)(1)) is not an offense eligible for Proposition 36 probation. The court instead placed each defendant on formal felony probation for five years, after service of time in county jail.

DISCUSSION

I. The Search Warrant Claim

A. Claim Regarding the Informant's Statement

Defendants contend the search was illegal because (1) the informant was a criminal whose allegations were not verified, and (2) all information in the affidavit was stale except for Grimes's purchase of two boxes of cold medicine a few days before the warrant issued. Defendants fail to show grounds for reversal.

“In reviewing denial of motions under section 1538.5, ‘[w]e apply the Fourth Amendment standard in deciding what remedy may be available following a claim of unlawful search or seizure. [Citations.] [¶] “ ‘An appellate court’s review of a trial court’s ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] “The court’s resolution of each of these inquiries is, of course, subject to appellate review.” [Citations.] [¶] The court’s resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.’ ” [Citation.]’ [Citation.]” (*People v. Nicholls* (2008) 159 Cal.App.4th 703, 709-710.)

The People acknowledge that defendants’ motion was in effect a motion to quash the search warrant, though not designated as such.

A defendant may move to suppress evidence obtained in a search on the ground there was no probable cause for issuance of the search warrant. (§ 1538.5, subd. (a)(1)(B)(iii).) A defendant may challenge the veracity of a facially valid

search warrant affidavit on the grounds it contains misrepresentations or omissions. (*Franks v. Delaware* (1978) 438 U.S. 154 [57 L.Ed.2d 667]; *People v. Luttenberger* (1990) 50 Cal.3d 1, 11 (*Luttenberger*); *People v. Kurland* (1980) 28 Cal.3d 376, 384 (*Kurland*)). If a defendant moves to quash a search warrant, “the court should proceed to determine whether, under the ‘totality of the circumstances’ presented in the search warrant affidavit and the oral testimony, if any, presented to the magistrate, there was ‘a fair probability’ that contraband or evidence of a crime would be found in the place searched pursuant to the warrant. [Citations.] In reviewing the magistrate’s determination to issue the warrant, it is settled that ‘the warrant can be upset only if the affidavit fails as a matter of law [under the totality-of-circumstances standard announced in *Illinois v. Gates* (1983) 462 U.S. 213, 238 (76 L.Ed.2d 527)] to set forth sufficient competent evidence supportive of the magistrate’s finding of probable cause, since it is the function of the trier of fact, not the reviewing court, to appraise and weigh evidence when presented by affidavit as well as when presented by oral testimony. [Citations.]’ ” (*People v. Hobbs* (1994) 7 Cal.4th 948, 975.) “This standard of review is deferential to the magistrate’s determination.” (*People v. Thuss* (2003) 107 Cal.App.4th 221, 235.)

“[A]n affidavit may be insufficient when it omits facts adverse to the warrant application. [Citations.] . . . [¶] . . . [¶] An affidavit may be as inaccurate when it omits facts as when it misstates them. The crucial, inference-drawing powers of the magistrate may be equally hindered in either case, with identical consequences for innocent privacy. [Citation.]” (*Kurland, supra*, 28 Cal.3d at p. 384.) “Though similar for many purposes, omissions and misstatements analytically are distinct in important ways. Every falsehood makes an affidavit inaccurate, but not all omissions do so. An affidavit need not disclose every imaginable fact however irrelevant. It need only furnish the magistrate with information, favorable and adverse, sufficient to permit a reasonable, common sense determination whether circumstances which justify a search are probably present. [Citations.]” (*Id.* at p. 384.)

“[A]n affiant’s duty of disclosure extends only to ‘material’ or ‘relevant’ adverse facts.” (*Kurland, supra*, 28 Cal.3d at p. 384.) Materiality means “only those omissions which significantly distort[] the probable cause analysis.” (*Id.* at p. 385.) “[F]acts are ‘material’ and hence must be disclosed if their omission would make the affidavit *substantially misleading*. On review under section 1538.5, facts must be deemed material for this purpose if, because of their inherent probative force, there is a substantial possibility they would have altered a reasonable magistrate’s probable cause determination.” (*Ibid.*)

“Unlike misstatements, omissions do not always render an affidavit inaccurate. [O]nly material omissions have that effect. Intentional omissions, unlike the intentional misstatements . . . are not necessarily an effort to mislead the magistrate. . . . They may arise from a correct, or at least reasonable, conclusion that the omitted facts were immaterial or privileged. [Fn. omitted.] The procedures and remedies applicable to omissions must account for those crucial differences.” (*Kurland, supra*, 28 Cal.3d at p. 387.)

“First, the reviewing court must determine whether any omissions asserted are material [¶] If an omission is found material, the reviewing court must next determine . . . whether it arose innocently or from culpable conduct. However, since not all intentional omissions of material facts are blameworthy, the reviewing court must apply a modified . . . formula for culpability. The necessary modification is plain. The trial court must decide whether the material omission was either (1) reasonable, (2) negligent, or (3) recklessly inaccurate or intentionally misleading. That the omission itself was ‘intentional’ rather than inadvertent may be relevant to those issues, but may not alone be dispositive.” (*Kurland, supra*, 28 Cal.3d at pp. 387-388, italics omitted.)

“A material omission is reasonable when despite the exercise of due care, affiant was ignorant of the omitted fact or forgot to include it, or his conclusion that it was privileged or immaterial was reasonable even if incorrect.” (*Id.* at p. 388.)

“The burden on the issues of materiality, privilege, and affiant’s culpability is to be allocated as in the case of misstatements. If the defense states ‘with some specificity’ its reasons for believing that material facts were omitted, it may try to show such omissions and their materiality. The obligation of showing that material omissions were proper or reasonable rests with the People, but defendant has the burden of demonstrating recklessness or intent to mislead. [Citation.]” (*Kurland, supra*, 28 Cal.3d at p. 390.)

Here, the affiant did not provide information from which the magistrate could reasonably conclude the informant was reliable. (*People v. McFadin* (1982) 127 Cal.App.3d 751, 763.) However, the affidavit did not rely solely on uncorroborated information from the informant. Rather, the informant’s observations were corroborated by the pharmacy logs showing excessive purchases of pseudoephedrine during the five months before the search warrant was executed, and the trial court expressly said it was not relying solely on the informant. The court said the informant’s information “was by itself stale and only was important . . . to give some context to the more recent information about the purchase of [PSE pills]. So the reason why the informant was no longer an informant is really not important because that information by itself does not independently establish probable cause.”

An omission was apparent on the face of the affidavit, which said the informant was deactivated, but did not explain why. However, defendants have not made any showing of materiality of this omission.

Defendants argue “the reason for the informant’s ‘deactivation’ was relevant and material to the magistrate’s determination of whether probable cause existed. Since the affiant had the burden of establishing reliability of the informant this glaring deficiency compels the conclusion that the informant was unreliable, and in turn that the affiant concealed material information. [¶] The defense believes that the informant was a criminal and that is how law enforcement contacted the informant, probably as a consequence of an arrest. The informant could not have been as conversant with

methamphetamine as the affiant describes unless he/she frequented the criminal underworld. This information including the prior criminal record should have been provided to the magistrate. The reason for the informant's deactivation should have been set forth in the affidavit since if the informant gave inaccurate information or was arrested again these are material facts. Since no description of the reason for the deactivation was provided to the magistrate one can only assume the reason contradicted probable cause. The affiant had a duty to provide all information concerning the informant. If the defense is correct, the informant is playing both sides of the street. Unless the informant has provided information that has been verified since his/her/their last arrest they are merely criminal informants, not confidential reliable informants. . . .”

This argument is filled with assumptions and speculation which might have been avoided had defendants pursued a motion to traverse the warrant, instead of a suppression motion. As the People note in the respondent's brief, defendants did not move to traverse the warrant. Quoting *People v. Panah* (2005) 35 Cal.4th 395, 456, the People wrote:

“Under *Franks v. Delaware, supra*, 438 U.S. 154, a defendant has a limited right to challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. When presented with such a challenge, the lower court must conduct an evidentiary hearing *if* a defendant makes a substantial showing that (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth, and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to support a finding of probable cause.” *Panah* continues, “The defendant must establish the statements are false or reckless by a preponderance of the evidence. [Citations.] Innocent or negligent misrepresentations will not defeat a warrant. [Citation.] ‘Moreover, “there is a presumption of validity with respect to the affidavit. To merit an evidentiary hearing[,] the defendant[’s] attack on the affidavit must be more than conclusory and must be supported by more than a mere desire to cross-examine. . . . The motion for an evidentiary hearing must be

‘accompanied by an offer of proof . . . [and] should be accompanied by a statement of supporting reasons. Affidavits or otherwise reliable statements of witnesses should be furnished,’ or an explanation of their absence given.”’ [Citation.] Finally, ‘[a] defendant who challenges a search warrant based upon an affidavit containing omissions bears the burden of showing that the omissions were material to the determination of probable cause.’ [Citation.]” (*Panah, supra*, 35 Cal.4th at p. 456.)

Defendants’ reply brief says, “A formal request for traversal of the warrant is not the issue before this court, but rather the intentional conduct of the affiant to conceal negative information concerning the informant’s credibility.” However, in the absence of the evidentiary hearing which could have been conducted had defendants made a showing for a motion to traverse the warrant, there is no evidence of intentional concealment of negative information. We are presented only with defendants’ assumptions and speculation.

For the first time, defendants cite *Luttenberger* in their reply brief. The court in *Luttenberger* held that, where the legality of a search warrant rests on uncorroborated observations of a confidential informant, a defendant is entitled to discovery to determine whether the informant is reliable and whether the affiant deliberately omitted material facts, if the defendant first offers evidence casting reasonable doubt on the veracity of material statements made by the affiant. (*Id.* at pp. 20-24.) Defendants argue that “intentional omission of the informant’s criminal history *vis a vis* his/her deactivation” casts reasonable doubt, which required the trial court to conduct an in camera hearing. However, defendants did not request an in camera hearing, did not seek discovery, and did not offer any evidence.⁶

⁶ Counsel for Grimes insisted at oral argument that he made a *Luttenberger* motion in the trial court. Specifically counsel stated, “We requested, and I would suggest this is still the appropriate remedy, is an in camera hearing for the magistrate to review the reason

Based on the record with which we are presented, we conclude the search warrant affidavit was not fatally defective due to material omissions.

B. Staleness Claim

Defendants next argue we must disregard, as stale, all information in the affidavit except Grimes's purchase of two boxes of cold medicine on March 28, 2010. Defendants rely on *Hemler v. Superior Court* (1975) 44 Cal.App.3d 430, where this court held information was stale where the warrant issued 34 days after the informant purchased

for the informant being deactivated.” When asked whether there was a motion to traverse filed in the trial court, counsel replied that the defense had not, but “what we filed was a *Luttenberger* motion which was simply to establish that there was some arguable deficiency that therefore the magistrate should have reviewed in camera, without the defense being there, the reason for the informant being deactivated.” “We did a *Luttenberger* *Luttenberger* says that if there is a deficiency in an affidavit that you can point to in some way, that you are entitled to an in camera hearing to have the judge determine that you are entitled to something else to maybe make the *Franks* showing.”

We have reviewed the record and find no *Luttenberger* motion or a written motion requesting an in camera hearing. Nor did defendants make an oral request for an in camera hearing at the hearing on the section 1538.5 motion. Indeed, at the beginning of that hearing, counsel for Grimes specifically stated that the defense was not contending that the warrant contained intentional misstatements or reckless misstatements and that the suppression motion was based on the “four corners” of the affidavit.

To the extent defendants now rely on *Luttenberger* and a contention that the trial court failed to conduct an in camera hearing, that argument is forfeited for failure to raise it in the trial court. (*People v. Williams* (1999) 20 Cal.4th 119, 129, 136 [when defendants move to suppress evidence under section 1538.5, they must inform the prosecution and the court of the specific basis for their motion, otherwise the contention is forfeited]; *People v. Davis* (2008) 168 Cal.App.4th 617, 629 [“review of a suppression issue may be obtained if and only if at some point before conviction the defendant raised the issue”].) Indeed, as we have noted, defendants did not raise the issue until their reply brief on appeal. (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2 [“ ‘Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it Hence, the rule is that *points raised in the reply brief for the first time will not be considered*, unless good reason is shown for failure to present them before.’ ”])

cocaine at the defendant's home, there was no information before the magistrate about any *prior or subsequent activity*, and the evidence indicated an absence of other drugs in the home because when the informant asked for more the defendant said he would "try" to get more. (*Id.* at pp. 433-434.) This court stated in *Hemler*, "While the question of 'stale' information depends upon the facts of each case [citation], there is specific authority which cannot be ignored. In the leading case of *SGRO v. United States* (1932) 287 U.S. 206 [77 L.Ed. 260] it was held that a delay of 20 days between the sale of contraband by the defendant and the issuance of the search warrant was such as to negate probable cause for believing in the current presence of contraband on defendant's premises. In the absence of other indications, delays exceeding four weeks are uniformly considered insufficient to show present probable cause [citation]. On the other hand, particular circumstances such as prior extended observations [citation] or a physical setting strongly suggestive of continuing illegal traffic in contraband [citation] have caused a delay of as much as seven weeks to be held sufficient to indicate present probable cause." (*Hemler, supra*, 44 Cal.App.3d at p. 434.)

This case is different. We are not presented with a narcotics sales situation. Here, the probable cause for searching was the stockpiling of pseudoephedrine for the purpose of manufacturing methamphetamine, not the existence of drugs seen at the location at a specific time. By its very nature, owing to federal law, which is designed to deter the purchase of pseudoephedrine to manufacture methamphetamine, the process of stockpiling is one that takes place over time. It cannot be done all at once. In such a situation, we do not look for prior and subsequent activity. We look for facts establishing ongoing activity. "Courts have upheld warrants despite delays between evidence of criminal activity and the issuance of a warrant, when there is reason to believe that criminal activity is ongoing or that evidence of criminality remains on the premises." (*People v. Carrington* (2009) 47 Cal.4th 145, 164 [fair probability that stolen checks remained at the defendant's home two months after burglary because they could still be

forged and cashed]; see also *People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1714-1715, 1718 [affidavit based on information two to four years old, combined with current information, painted picture of continuing participation in drug trade].) We conclude the affidavit established probable cause for issuance of the warrant, and we therefore need not address the People’s backup argument about applicability of the good-faith exception to the exclusionary rule. (*United States v. Leon* (1984) 468 U.S. 897 [82 L.Ed.2d 677].)

The trial court properly denied the suppression motion.

II. Proposition 36

Defendants contend they are entitled to Proposition 36 probation with drug treatment, as codified in section 1210.1,⁷ because their crimes were nonviolent drug possession offenses. Defendants claim the trial court improperly used the dismissed count of manufacturing methamphetamine as the basis to deny Proposition 36 probation. Defendants are wrong.

In addition to possession of methamphetamine, each defendant was also convicted of a second offense -- possession of pseudoephedrine with the intent to manufacture methamphetamine. (Health & Saf. Code, § 11383.5, subd. (b)(1).)⁸ It was this offense which rendered defendants ineligible for Proposition 36 probation because, as the trial court reasoned, it is “a commercial precursor charge.”

Section 1210, subdivision (a), provides, “The term ‘nonviolent drug possession offense’ means the unlawful personal use, possession for personal use, or transportation

⁷ Section 1210.1 provides in part, “(a) Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program.”

⁸ Health and Safety Code section 11383.5, subdivision (b)(1), provides, “Any person who, with the intent to manufacture methamphetamine . . . possesses ephedrine or pseudoephedrine . . . is guilty of a felony”

for personal use of any controlled substance identified in Section 11054, 11055, 11056, 11057 or 11058 of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. The term ‘nonviolent drug possession offense’ does not include the possession for sale, production, or manufacturing of any controlled substance and does not include [drug possession in prison or jail or where prisoners are kept].”

“Expressly excluded from the definition of ‘ “non-violent drug possession offenses” ’ are drug charges that are commercial in nature, i.e., ‘sale, production, or manufacturing of any controlled substance.’ ” (*People v. Ferrando* (2004) 115 Cal.App.4th 917, 920.) In *Ferrando*, this court concluded, “The offense of opening or maintaining a place ‘for the purpose of unlawfully selling, giving away, or using any controlled substance’ is not a simple possession offense. Rather, it is more like the commercial offenses expressly excluded from the provisions of Proposition 36.” (*Ibid.*)

Similarly, this court held in *People v. Sharp* (2003) 112 Cal.App.4th 1336, that Proposition 36 did not apply to a conviction for cultivation of marijuana for personal use under Health and Safety Code section 11358. Cultivation is production, and Proposition 36 excludes possession for production. (*Id.* at p. 1340.) “Like manufacturing, it is considered a more serious offense than possession.” (*Ibid.*) This court rejected the defendant’s argument that there was no reason to exclude cultivation for personal use. The drafters of Proposition 36 “may have believed that the experiment of drug treatment in lieu of incarceration should not extend to those who are so heavily involved in drug use that they manufacture or cultivate the drugs, rather than merely possess and use them.” (*Ibid.*) “[W]here a statutory scheme designed to provide treatment for nonviolent drug offenders fails to include a particular nonviolent drug offense, it is for the Legislature, not the courts, to amend the statute to add the missing offense.” (*Id.* at p. 1342.)

Here, possessing pseudoephedrine or ephedrine *with intent to manufacture methamphetamine* (Health & Saf. Code, § 11383.5, subd. (b)(1)) is not a simple possession offense but is more like the commercial offenses excluded from Proposition 36.

Defendants argue ephedrine and pseudoephedrine are immediate precursors to methamphetamine and are therefore controlled substances, which defendants claim they possessed only to make methamphetamine for their own personal use, not for sale. Defendants claim Health and Safety Code section 11383.5, subdivision (b)(1) “requires only simple possession. This offense does not include the possession for sale, production, or manufacturing of a controlled substance.”

Defendants are clearly wrong. The offense of which defendants were convicted, Health and Safety Code section 11383.5, subdivision (b)(1) (See fn. 8, *ante*), criminalizes possession “with the intent to manufacture methamphetamine. . . .” Moreover, pseudoephedrine and ephedrine are not themselves controlled substances as defined in Health and Safety Code sections 11054 to 11058, nor are they “immediate precursor[s]” to methamphetamine. (Health & Saf. Code, § 11055, subd. (f) [“immediate precursor” to methamphetamine is phenylacetone, aka phenyl-2 propane, P2P, benzyl methyl ketone, and methyl benzyl ketone]; *People v. Pierson* (2001) 86 Cal.App.4th 983, 990-991 [defendant was improperly convicted of manufacturing a controlled substance, methamphetamine, based on his extraction of ephedrine because ephedrine and pseudoephedrine are not “immediate precursor[s]” to methamphetamine].)

It is only possession of pseudoephedrine or ephedrine “with intent to manufacture methamphetamine” that constitutes a crime. “[T]he mere possession of pseudoephedrine is not prohibited and punishable by imprisonment absent an intent to manufacture methamphetamine. ([Health & Saf. Code,] § 11383, subd. (c).)” (*People v. Coria* (1999) 21 Cal.4th 868, 880.) Accordingly, the offense is not a simple possession offense.

We conclude Proposition 36 does not apply.

DISPOSITION

The judgment is affirmed.

MURRAY, J.

We concur:

RAYE, P. J.

BUTZ, J.