IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KEITH O. MATTHEWS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11479 Trial Court No. 3KO-11-470 CR MEMORANDUM OPINION No. 6552 — December 6, 2017

Appeal from the Superior Court, Third Judicial District, Kodiak, Steve W. Cole, Judge.

Appearances: Brooke Berens, Assistant Public Advocate, Appeals and Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, and Keith O. Matthews, *in propria persona*, Seward, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg, Judges.

Judge MANNHEIMER.

Keith O. Matthews appeals his convictions for third-degree controlled substance misconduct (possession of cocaine with intent to distribute) and fourth-degree controlled substance misconduct (simple possession of cocaine). He contends that he

was subjected to an unlawful traffic stop, and that this unlawful stop tainted the search warrants that were later issued for his person and his vehicle. Matthews also argues that he should not have received separate convictions for possession of cocaine and possession of cocaine with intent to distribute.

For the reasons explained in this opinion, we conclude that the evidence against Matthews was obtained lawfully. However, the State concedes — and we agree — that Matthews should not have received a separate conviction for simple possession of cocaine.

Underlying facts

Although the specific events in this case occurred in September 2011, the Kodiak Police Department had been investigating Matthews as a possible drug dealer since 2004. The department kept what they called a "running affidavit" on Matthews — basically, a cumulative police report of all the tips that the department had received pertaining to Matthews, and of the various investigative efforts that the Kodiak police had conducted relating to him.

Between 2004 and September 2011, the Kodiak police received numerous tips that Matthews was dealing drugs in Kodiak. These tips took the form of "crime stopper" calls, anonymous tips, and tips from known informants. The repeated theme of these tips was that Matthews would fly into Kodiak, rent a car, sell his drugs, and then leave again when his supply was gone.

Although the Kodiak police had not previously charged Matthews with selling drugs, they had discovered evidence at various times that tended to corroborate the repeated tips that Matthews was a drug dealer.

In 2006, during a traffic stop of Matthews, the Kodiak police found a bag of a powdery white substance in his vehicle, and they also discovered that Matthews was carrying $1700 in cash, divided into $100 increments. The following year, the Kodiak police were called to investigate a backpack that had been left outside an apartment. The backpack contained a scale that had cocaine residue on it, several empty plastic baggies, and an electric bill addressed to Matthews.

In early September 2011, the Kodiak police responded to a report that drugs had been found in an apartment. Apparently, the tenant of this apartment had just returned to Kodiak, and he found that Matthews was living in the apartment — squatting there after he had been denied a lease. When the tenant confronted Matthews, Matthews announced that he was leaving and returning to Anchorage. After Matthews left, the tenant searched the apartment and found marijuana and drug paraphernalia — and then he called the police.

When the police arrived, they too searched the apartment, and they found suspected cocaine and a box of plastic baggies. They also found several bank deposit receipts in Matthews's name, including one for $3500. The owner of the apartment — the one who had refused to lease the apartment to Matthews — told the police that Matthews had attempted to pay the $1000 security deposit entirely with $20 bills.

The events in the present case began about three weeks later, on September 21, 2011, when the Kodiak police received a call from a woman who wished to remain anonymous. The anonymous caller stated that she knew Matthews from her bartending days, and that he was a "go to" guy for drugs. The caller told the police that Matthews was back in Kodiak, and that he was driving a rented Nissan truck — which she identified as a Titan V8 four-door with a bent front license plate. The caller added that Matthews was carrying a green duffel bag with airline tags on it.

The following day (September 22), a Kodiak police detective contacted the airline and the car rental company; the detective confirmed that Matthews had just flown in to Kodiak, and that Matthews had rented a truck matching the description given by the anonymous caller. The police obtained the truck's license plate number from the rental company, and they soon discovered that this truck was parked outside of a local bar. The police waited for Matthews to leave the bar, and then they performed the traffic stop at issue in this case.

The police did not obtain any evidence directly from the traffic stop. Rather, the police simply held Matthews and his vehicle until they could apply for search warrants authorizing them to search Matthews's person and the rented truck.

When the police executed these warrants, they found a bindle of cocaine in Matthews's wallet, and they found cocaine, empty packaging bindles, a digital scale, gloves, and steel mesh screens in Matthews's rented truck.

Matthews was charged with one count of possessing cocaine and one count of possessing cocaine with intent to distribute. He filed a motion seeking suppression of all the evidence obtained following his traffic stop, but the superior court denied this motion. Matthews was later convicted of both cocaine charges at a jury trial.

Matthews's claim that the traffic stop was unlawful

On appeal, Matthews contends that the police had no valid grounds for stopping his vehicle and detaining him while they applied for the search warrants. But the record in this case shows that when the police conducted the traffic stop, they not only had reasonable suspicion to conduct the stop, but also probable cause to arrest Matthews.

The police had received a detailed tip from an anonymous caller. This tip was so detailed that it supported an inference of personal knowledge under the *Aguilar-Spinelli* test for probable cause. [1]

Although the anonymous caller did not explain how she obtained her information, the United States Supreme Court has held that the detail of an informant's tip can support the inference that the informant is speaking from first-hand knowledge, rather than repeating "a casual rumor circulating in the underworld" or making "an accusation based merely on an individual's general reputation". [2]

The United States Supreme Court applied this principle in *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). The informer in *Draper* described the defendant and his apparel with particularity, and included a description of his gait. The informer further stated that the defendant would be carrying a zippered bag and would arrive at the railroad station on either of two dates. *Id.*, 358 U.S. at 309, 79 S.Ct. at 331. The Supreme Court held that this amount of detail bespoke personal knowledge. *Ibid.*

The Alaska Supreme Court applied this principle in *Schmid v. State*, 615 P.2d 565, 574 (Alaska 1980), and this Court applied it in *Rynearson v. State*, 950 P.2d 147, 150 (Alaska App. 1997).

This principle applies to Matthews's case as well: the kind of detail supplied by the anonymous caller in this case reasonably supports the inference that she

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[1] *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *See State v. Jones*, 706 P.2d 317, 324-25 (Alaska 1985) (holding that, as a matter of state law, the *Aguilar-Spinelli* test continues to govern the evaluation of hearsay information offered to support a search or seizure).

[2] *Spinelli v. United States*, 393 U.S. 410, 416; 89 S.Ct. 584, 589; 21 L.Ed.2d 637 (1969).

was speaking from personal, recent knowledge — thus satisfying the personal knowledge prong of the *Aguilar-Spinelli* test.

The other prong of the *Aguilar-Spinelli* test requires the government to show that the informant is a reliable source of information. Here, the Kodiak police did not assert that they had prior dealings with the anonymous caller. However, before the police took action on the caller's tip, they conducted a follow-up investigation with the airline company and the car rental company. These companies confirmed what the anonymous caller had said: Matthews had just arrived in Kodiak by air, and he had rented the truck that the caller described.

Moreover, the Kodiak police department's previous encounters with Matthews and their other previous investigative efforts relating to Matthews — many of which we have already described in this opinion — tended to confirm the caller's assertion that Matthews was a drug dealer, and tended to support the reasonable inference that Matthews had returned to Kodiak to sell drugs.

Thus, when the police conducted the traffic stop in this case, they already had probable cause to arrest Matthews and to seize his rented vehicle while they applied for the search warrants.

Matthews's claim that the search warrants were illegally issued

Matthews attacks the search warrants in this case on several grounds.

Matthews claims that the search warrant application is based mainly on unsupported hearsay that does not establish probable cause to issue the warrants. But the search warrant application contains the results of the prior police investigations that we described earlier, as well as a description of the anonymous tip and the follow-up

investigation that occurred just prior to the search warrant application. This information provided ample probable cause for the issuance of the search warrants.

Matthews also claims that the search warrants should be invalidated under the Alaska Supreme Court's decision in *State v. Malkin*, 722 P.2d 943 (Alaska 1986). In *Malkin*, the supreme court held that intentional or reckless misstatements of fact in a search warrant application can invalidate the warrant. *Id.* at 946 & n. 6.

Matthews's claim of misstatements in the search warrant application arises from the fact that the officer who prepared the search warrant application — Detective William Pyles — wrote a supporting affidavit that detailed the Kodiak Police Department's years of investigation into Matthews's activities. When the detective compiled this supporting affidavit, he cut and pasted text from the Kodiak Police Department's "running affidavit" pertaining to its past investigations of Matthews. These pasted sections were originally written by other officers. Although the identity of these other officers is usually mentioned in the pasted sections of text, there are occasional sections where these officers used the pronouns "I" and "me" when they described their investigations. And when Detective Pyles inserted these sections of text into his search warrant affidavit, he did not replace the first-person pronouns with the officers' names.

Thus, the finished affidavit contains a few paragraphs which read as if Detective Pyles had personally conducted the prior investigative efforts, when in fact those prior investigative efforts were conducted by other officers in the department. However, the erroneous pronouns appear in only a few paragraphs of a factual recitation that, in total, contains 26 paragraphs. And Detective Pyles plainly stated at the beginning of his recitation that "the information contained in this affidavit comes from my investigation and the written and oral reports of other law enforcement officers from the Kodiak Police Department."

As the superior court noted in its written decision, Detective Pyles conceded at the evidentiary hearing that, by using a cut-and-paste technique to assemble the search warrant affidavit, he mistakenly included the pronouns "I" and "me" when he described some of the Kodiak Police Department's prior investigative efforts. However, the superior court concluded that these mistakes were harmless.

On appeal, Matthews contends that the detective's statements were "intentional", and thus the search warrants should be invalidated even if the detective's misstatements were immaterial to the magistrate's decision to issue the warrants. *See Malkin*, 722 P.2d at 946 n. 6.

But in *Lewis v. State*, 862 P.2d 181, 186-87 (Alaska App. 1993), and in *Gustafson v. State*, 854 P.2d 751, 756 (Alaska App. 1993), this Court held that, for purposes of applying the suppression rule announced in *Malkin*, a misstatement is "intentional" only if it was consciously made in a "deliberate attempt to mislead" the magistrate into issuing the warrant. In Matthews's case, there is essentially no evidence in the record to support such a conclusion.

Moreover, Matthews can not ask this Court to make such a finding. A person's intent is a question of historical fact; thus, any finding as to whether a police officer deliberately intended to mislead a judicial officer must be made by the trial court.

Here, the superior court's written decision does not explicitly resolve the question of whether Detective Pyles deliberately tried to mislead the magistrate into issuing an unfounded warrant. But as we noted earlier, the superior court resolved Matthews's suppression motion by finding that the detective's mistaken inclusion of first-person pronouns was "ultimately harmless". In other words, the superior court concluded that the search warrant application continued to establish probable cause for the warrants after these misstatements were corrected. This amounts to an implicit finding that the detective did *not* deliberately seek to mislead the magistrate — because,

under *Malkin*, an analysis of whether probable cause remains after the misstatements are corrected is only needed if the police officer's misstatements were *not* intentional.

This leaves the question of whether the detective acted recklessly when he included the paragraphs that contained first-person pronouns — because, under *Malkin*, if a search warrant application contains misstatements of fact and the trial judge concludes that those misstatements were made recklessly, the judge must assess whether the search warrant application still establishes probable cause for issuing the warrant after those misstatements are corrected. *Malkin*, 722 P.2d at 946; *Lewis*, 862 P.2d at 186.

We conclude that this issue of recklessness is moot because we agree with the superior court that, when the misuses of personal pronouns in the search warrant affidavit are corrected, the affidavit still establishes probable cause to issue the warrants.

For these reasons, we uphold the search warrants in this case.

Matthews should not have received a separate conviction for simple possession of cocaine

As we described at the beginning of this opinion, Matthews was convicted of two cocaine charges: third-degree controlled substance misconduct for possessing cocaine with intent to distribute, and fourth-degree controlled substance misconduct for simple possession of cocaine. On appeal, he contends that these offenses should merge, and that he should only be convicted of the greater charge (third-degree controlled substance misconduct).

As the State concedes in its brief, Matthews's case was litigated in a way that did not distinguish the two counts of controlled substance misconduct. In the charging documents, the two counts are premised on Matthews's possession of "any amount" of cocaine, and the jury was never instructed that there was any difference

between the cocaine that Matthews possessed for sale or distribution and the cocaine that he simply possessed. Nor did the prosecutor draw any distinction between the cocaine involved in these two counts when he argued the case to the jury.

Given these circumstances, Matthews's case is governed by our decisions in *Atkinson v. State*, 869 P.2d 486, 495 (Alaska App. 1994), and *McGowen v. State*, 359 P.3d 988, 989-990 (Alaska App. 2015). Matthews's convictions must merge into a single conviction for the greater crime, third-degree controlled substance misconduct. We therefore direct the superior court to enter a single, merged conviction based on the jury's two verdicts. [3]

Conclusion

The superior court is directed to amend the judgement against Matthews to reflect a single merged conviction for third-degree controlled substance misconduct, based on the jury's guilty verdicts on Counts 1 and 2. Because Matthews received a completely concurrent sentence for the lesser crime of fourth-degree controlled substance misconduct, it will not be necessary for the superior court to re-sentence Matthews.

With this exception, the judgement of the superior court is AFFIRMED.

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[3] *See Nicklie v.State*, 402 P.3d 424, 425-26 (Alaska App. 2017); *Jordan v. State*, 367 P.3d 41, 44 (Alaska App. 2016); *Garhart v. State*, 147 P.3d 746, 752-53 (Alaska App. 2006).