

STATE OF MICHIGAN
IN THE 16th CIRCUIT COURT FOR THE COUNTY OF MACOMB
CRIMINAL DIVISION

PEOPLE OF THE STATE MICHIGAN,)	
Plaintiff-Appellee,)	
)	
v.)	Cause No. 13-1880-FH
)	
)	Hon. Edward A. Servito, Jr.
)	
DAVID DABISH,)	Judge Presiding
Defendant-Appellant.)	

**DEFENDANT-APPELLANT PETITION FOR LEAVE TO APPEAL AND
MOTION TO STAY TRIAL**

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS	Page No.
Index of Authorities	3
Jurisdictional Statement	4
Statement of Questions Involved	5
Statement of Facts	6
Argument I	9
Argument II	12
Argument III	14
Conclusion	15

INDEX OF AUTHORITIES

<i>People v. Russo</i> , 439 Mich. 584 (1992)	9, 10
<i>Illinois v. Gates</i> , 462 U.S. 213, 236 (1983)	10
<i>Aguilar v. Texas</i> , 378 U.S. 108, 112 (1964)	10
<i>Groh v. Ramirez</i> , 540 U.S. 551 (2004)	11
<i>Massachusetts v. Sheppard</i> , 468 U.S. 981 (1984)	11
<i>United States v. Stefonek</i> , 179 F.3d 1030 (CA7 1999)	11
<i>McDonald v. United States</i> , 335 U.S. 451 (1948)	11
<i>United States v. Leon</i> , 468 U.S. 897 (1984)	11
<i>People v. Gillam</i> , 93 Mich. App. 548, 552 (1972)	12
<i>People v. Mushlock</i> , 226 Mich 600 (1924)	12
<i>People v. Siemieniec</i> , 368 Mich. 405 (1962)	12
<i>United States v Harris</i> , 403 U.S. 573 (1971)	12
<i>People v. Briolo</i> , 58 Mich. App. 547 (1975)	13
<i>People v. Daughenbaugh</i> , 193 Mich. App. 506 (1992)	14
M.C.L., § 780.651(1)	9
MSA 28, 1259(l) (1)	9
M.C.L., 780.653	9
MSA 28.1259(3)	13
MCR § 6.120 (C)	14
MCR § 6.121 (B)	15

JURISDICTION

The Court of Appeals has jurisdiction over this timely-filed application for leave to appeal pursuant to MCR 7.205(A).¹

¹ The docket sheets and appealed from order are attached hereto as Exhibits G and H, respectively.

ISSUES

- I. **Whether the trial court failed to suppress evidence of artificial marijuana borne from a search warrant and affidavit devoid of probable cause for such contraband.**
- II. **Whether the trial court failed to suppress evidence derived from a stale warrant.**
- III. **Whether the trial court failed to grant a motion to bifurcate Mr. Dabish and his brother's trial when the alleged crimes ascribed to both individuals were unrelated to one another.**

FACTUAL BACKGROUND

In or about March 2012, the Shelby Township Narcotics Unit had received a tip that individuals at the Citgo Gas Station at 46555 Van Dyke ("Citgo") and Woodstock Tobacco at 46699 Van Dyke ("Woodstock Tobacco") were selling synthetic marijuana/K2 ("K2") (See residential search warrant and affidavit, attached as Exhibit A, at 3).

Then, during the week of July 9th, 2012, confidential informant number 411 ("CI") contacted the police to let them know he could arrange the purchase of K2 from the Citgo. (Exh. A, at 3). Sgt. Schmittler then met with this police officer at a pre-arranged location to give this individual funds with which to purchase contraband. (Exh. A at 3). Sgt. Schmittler then, from a distance, observed the CI enter the Citgo and then return to his vehicle. (Exh. A at 3). Mr. Dabish allegedly exited the Citgo, walked over to the CI's vehicle, and gave the CI supposed K2. (Exh. A at 3). Mr. Dabish, according to Sgt. Schmittler, then allegedly engaged in an additional transaction involving K2. (Exh. A at 3). No lab tests were conducted on the contraband at issue to confirm if the substance was K2. (See May 4th, 2015 hearing, attached as exhibit B, at 4.). Indeed, no evidence at all indicated that Mr. Dabish ever transacted with a controlled substance. (Exh. B, at 4.). The following week after this transaction, the CI purchased K2 at the Citgo from one of Mr. Dabish's brother's Audrek Dabish. (Exh. A at 3). Then, during the week of July 23, 2012, this CI purchased marijuana from Woodstock Tobacco. (Exh. A at 3). The affidavit stated that the Citgo and Woodstock facilities were owned by the "Dabish Family," based on

city records. (Exh. A at 6). However, though not indicated in the Affidavit, Jeffrey Dabish did not have an ownership interest in either location. (See May 11th, 2015 hearing, attached as exhibit C, at 8) Based on this affidavit, a search warrant was entered on October 30, 2012, granting permission to search Mr. Dabish's residence for the possession of substances in violation of the Michigan Health Code including marijuana, as well as Woodstock Tobacco and Citgo. (Exh. A at 8); (See Search Warrant and Affidavit for Woodstock Tobacco and Citgo, attached hereto as Exh. D and E). Based on the evidence discovered at these locations, the State charged Mr. Dabish with delivery/manufacture of a controlled substance (count one); possession of a controlled substance (count two); and maintenance of a drug house (count three). (See Complaint, attached as Exhibit F.).

Hearings on Motion to Suppress

A hearing to suppress the evidence garnered from Mr. Dabish's home was held at May 4th, 2015. (Exh. B, at 4.). At this hearing, the State admitted that none of the substances collected from Mr. Dabish at the exchanges with the CI referenced above tested positive for a controlled substance. (Exh. B at 4). Based on this, the trial court judge remarked "We don't have the delivery of a controlled substance...So there is really no probable cause that a control substance is at the residence...you [got] a search warrant on the basis that there is a controlled substance, when in fact there is no basis for the controlled substance." (Exh. B at 5). The State then argued that sufficient probable cause existed for a search for K2 and that anywhere K2 could be found the "real stuff" could be found, to which the trial court judge responded "But

the problem is the representation [in the affidavit] was that it was K-2, that's the problem, and in fact there is not a basis for it." (Exh. B at 6). The State then acknowledged that though David Dabish allegedly represented to the CI that the transacted substance was K2, laboratory tests revealed that it was not. (Exh. B at 8). The State also acknowledged that the only substance gathered from the various hand-to-hand transactions at issue testing positive for a controlled substance did not relate to Mr. Dabish. (Exh. B at 6, 14). The trial court judge then remarked that Mr. Dabish's brother's transactions did not give cause for a Search of Mr. Dabish's home. (Exh. B at 8). Though the trial court judge then decided that no laboratory test was required for finding probable cause of controlled substance in this matter, he nevertheless equivocated that "the problem I have is it's a **misrepresentation** with the warrant that it is a controlled substance. That's the problem." (Exh. B at 17) (emphasis added). At the follow up hearing, the trial court judge added the issue: "Was this **recklessness** on the part of the affiant, and was the representation that K-12 was being sold by the defendant an adequate representation for the magistrate." (Exh. C at 4) (emphasis added). The trial court judge believed that despite this "recklessness," sufficient probable cause to grant the warrants at issue existed and this appeal followed as a consequence.

ARGUMENT

I. **The trial court failed to suppress evidence of artificial Marijuana borne from a search warrant and affidavit devoid of probable cause for such contraband.**

The Michigan Constitution provides that a search warrant may issue only on a showing of probable cause, supported by oath or affirmation:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.

[Const. 1963, art 1, 11.]

Implementing this constitutional mandate, M.C.L., § 780.651(1) MSA 28, 1259(1) (1) and M.C.L., 780.653; MSA 28.1259(3) require that probable cause be shown in the form of an affidavit presented to a magistrate who will decide whether to issue a warrant on the basis of the affidavit's contents. "When an affidavit is made on oath to a magistrate authorized to issue warrants in criminal cases, and **the affidavit establishes grounds for issuing a warrant pursuant to this act**, the magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant to search the house, building, or other location or place where the property or thing to be searched for and seized is situated." [MCL 780.651(1); MSA 28.1259(1)(1) (emphasis added).] "The magistrate's findings of reasonable or probable cause **shall be based on all the facts related within the affidavit made before him or her.**" [MCL 780.653; MSA 28.1259(3) (emphasis added).]

This Court applies the standard set forth in *People v. Russo* when evaluating a magistrate's determination that probable cause existed to conduct a search. 439

Mich. 584, 604 (1992). The *Russo* standard requires a court to interpret a search warrant and underlying affidavit in a common-sense and realistic manner.” *Russo*, 439 Mich. at 604. Though a reviewing court must grant deference to a magistrate’s probable cause determination, this deference “requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a ‘substantial basis’ for the finding of probable case.” *Russo*, 439 Mich. at 603, quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983). In making such a determination, this Court may only consider the facts presented to the magistrate. *Aguilar v. Texas*, 378 U.S. 108, 112 (1964).

Here, there was no hand to hand buy that was done at Mr. Dabish’s house directly or indirectly. Too, there was no evidence or testimony provided by the CI in the affidavits indicating that Mr. Dabish hid contraband at his home, facilitated the purchase or sale of contraband at his home. Finally, none of the tests performed on the substances involved in Mr. Dabish’s alleged hand-to-hand transactions, **outside of his home**, were marijuana or even K2 for that matter. For these reasons, a reasonably cautious person could not have concluded that there was a ‘substantial basis’ for the finding of probable case” that a controlled substance existed at Mr. Dabish’s home. *Russo*, 439 Mich. at 603.

In addition the misrepresentation on the warrant at issue for Mr. Dabish rendered it unlawful. The trial court judge concluded that reading a warrant in a “common sense” manner essentially gave him *carte blanche* to approve a warrant he defined as a “misrepresentation” and “reckless.” (Exh. B at 17)(Exh. C at 4) This is

not the law, however. The Fourth Amendment states unambiguously that “no warrants shall issue, but upon probable cause supported by Oath or affirmation, and **particularly describing** the place to be searched, and the person **or things to be seized.**” *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (emphasis in original). The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. See *Massachusetts v. Sheppard*, 468 U.S. 981, 988, n. 5 (1984) (“[A] warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional”); see also *United States v. Stefonek*, 179 F.3d 1030, 1033 (CA7 1999) (“The Fourth Amendment requires that the *warrant* particularly describe the things to be seized, not the papers presented to the judicial officer . . . asked to issue the warrant”). And for good reason: “The presence of a search warrant serves a high function,” *McDonald v. United States*, 335 U.S. 451, 455 (1948). Therefore, a warrant that fails in its particularity requirement is in fact to be construed as no warrant at all. *Groh*, 540 U.S. at 558; *McDonald*, 335 U.S. at 455; *United States v. Leon*, 468 U.S. 897, 923 (1984). The trial court judge in this matter described the warrant’s description of what was to be sought as a “misrepresentation” and “reckless.” The Constitution’s requirement of “particularity” is hopelessly irreconcilable with the phrase “misrepresentation” and “reckless.” Observance of this particularity requirement is not a mere technicality. See *Groh*, 540 U.S. at 559 (“We are not dealing with formalities [b]ecause the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion stands at the very core of the Fourth Amendment” (internal quotes and

cites omitted)). This Court should reverse the trial court judge's refusal to suppress the search of Mr. Dabish's home as a consequence.

II. The trial court failed to suppress evidence derived from a stale warrant.

Assuming, *arguendo*, that probable cause for the search warrant existed after the controlled buy in this matter, this does not mean that probable cause existed when the warrant was effectuated, **over a month later**. The passage of time is a valid consideration in deciding whether probable cause exists. *People v. Gillam*, 93 Mich. App. 548, 552 (1972). For a warrant to be issued, there must be a showing of reasonable cause to believe that illegal activity is occurring at the time of the warrant request. *People v. Siemieniec*, 368 Mich. 405, 407 (1962). "There is no hard and fast rule as to how much time may intervene between the obtaining of the facts and the making of the affidavit upon which the search warrant is based." *People v. Mushlock*, 226 Mich 600, 602 (1924). *United States v Harris*, 403 U.S. 573 (1971). "In the final analysis, the measure of a search warrant's staleness rests not on whether there is recent information to confirm that a crime is being committed, but whether probable cause is sufficiently fresh to presume that the sought items remain on the premises." *People v Gillam, supra*, p 553; *United States v Townsend*, 394 F Supp 736 (EDMich,1975).

In *Siemieniec, supra*, the police officer's affidavit stated that defendant had illegally sold liquor four days earlier. The court noted that the fact that defendant sold liquor four days earlier was not probable cause to believe that she was continuing to illegally sell liquor. The court held that the affidavit must state that there is some

sort of continuing illegal activity. Similarly, in *People v. Briolo*, the defendant made a drug sale to a police officer. 58 Mich. App. 547, 552 (1975). Forty-two days after the second and final sale, the police officer obtained a search warrant. Citing to *Siemieniec, supra*, the Court held that any probable cause which had existed when the drug sale was made was stale by the time the search warrant was obtained. The court stated that when there is a substantial delay, no warrant may be issued unless there is a showing of continuing criminal activity.

Here, the warrants for Woodstock and for Mr. Dabish's home were not effectuated until October 31st, 2012, over a month from the date the hand to hand buy occurred at Woodstock by Mr. Dabish's brother to the time the warrant was effectuated. Too, the amount of time lapse is even greater if you consider the trial court judge's original statement that Mr. Dabish may not be held accountable for the illegal activity of his brother. (Exh. B at 8). The affidavits supporting these warrants did not evidence "continued criminal activity" directly related to Mr. Dabish either. Though the trial court apparently waived in its original belief that Mr. Dabish is not accountable for his brother's sins, he later believed Mr. Dabish's brother's hand-to-hand transaction at Woodstock Tobacco in July 2012 somehow evidenced a criminal connection to Mr. Dabish, such is not the case. Mr. Dabish's brother, Jeffrey Dabish, has no ownership interest in Woodstock Tobacco or Citgo. (Exh E at 8). Thus, the only connection Mr. Dabish has to Jeffrey Dabish is familial, not criminal. This is insufficient to establish a criminal connection. Moreover, Woodstock Tobacco cannot be held vicariously liable for one who possesses no ownership interest in it

who committed criminal activity at its premises without authorization. Accordingly, in the absence of continued criminal activity attributable to Mr. Dabish, these search warrants were both stale. *Siemieniec*, 368 Mich. at 407; *Briolo*, 58 Mich. App. at 552.

III. The trial court failed to grant a motion to bifurcate Mr. Dabish and his brother's trial when the alleged crimes ascribed to both individuals were unrelated to one another

Upon a defendant's motion, a trial court **must** sever unrelated offenses. MCR § 6.121 (B); MCR § 6.120 (C). Offenses are related they are: "(a) the same conductor transaction, or (b) a series of connected acts, (c) a series of acts constituting parts of a single scheme or plan." That is, two offenses are related if based on the same conduct or a series of connected acts or acts constituting part of a single scheme or plan. *People v. Daughenbaugh*, 193 Mich. App. 506, 09-11 (1992). As the *Daughenbaugh* court further explained:

"Same conduct" refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle." "A series of acts connected together" refers to multiple offenses committed "to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery." "A series of acts . . . constituting parts of a single scheme or plan" refers to a situation "where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank.

Daughenbaugh, 193 Mich. App. at 509-10. In the present case, the record reveals no evidence that the Dabish brothers colluded or corroborated with one another to commit their separate alleged crimes. Nor, was there any evidence put forth that the Dabish brothers alleged offenses, when considered together, exhibit some scheme or modus operandi. For these reasons, the trial court erred by failing to abide by both

the plain and mandatory language regarding severance--“a trial court **must** sever unrelated offenses.” MCR § 6.121 (B).

CONCLUSION

Defendant-Appellant David Dabish hereby requests this Court to reverse the trial court’s ruling denying his motion to Suppress and Bifurcate Trial, as well as to order any other appropriate relief. In addition, Defendant-Appellant requests that his trial scheduled for July 24th, 2015 be stayed during the pendency of this appeal.

7.23.2015

Date

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The following facts are sworn to by the Affiant in support of the issuance of this warrant:

Affiant has been employed as a Police Officer since 1989.

Affiant has been employed by the Shelby Township Police Department as a Police Officer since 1995.

Affiant is currently assigned to Shelby Townships Detective Bureau to investigate the illegal trafficking/use of controlled substances and other crimes

Affiant has been involved in over 1500 investigations and has over 9 year experience investigating the illegal trafficking of controlled substances.

It is affiant's experience that persons involved in the trafficking/use of controlled substances are often in possession of currency and/or negotiable instruments from prior drug transactions.

It is affiant's experience that persons involved in the illegal trafficking/use of controlled substances often store additional quantities of the controlled substances within their residence and storage facilities.

It is affiant's experience that scales, packaging, containers, records, computers, computer equipment, books, accounts and telephone records are often used by persons involved in the trafficking/use of illegal controlled substances. Records, bills and photographs are often found establishing ownership and/or residency.

It is affiant's experience that firearms are very often used by persons involved in the trafficking/use of illegal controlled substances for their protection, and/or the protection of their controlled substances and/or proceeds.

It is affiant's experience that persons involved in the trafficking/use of controlled substances often keep additional quantities of the controlled substances, packaging materials, and scales in vehicles registered to them and use these vehicles to facilitate the purchase and/or sale of illegal controlled substances.

It is affiant's experience that persons involved in the trafficking/use of controlled substances are often also involved in other criminal activity including but not limited to thefts, larcenies and possession of stolen property.

During the past 9 months Shelby Twp narcotics unit has received at least 100 tips that the owners of Citgo at 46555 Van dyke and Woodstock Tobacco at 46699 Van dyke are selling synthetic marijuana/k2. Affiant has personally received several tips from detectives throughout Macomb County in reference to Citgo and Woodstock selling synthetic marijuana/ K2.

Affiant has been contacted by D/Lt. Eric Old from the COMET task force stating he has received numerous tips about Citgo/Woodstock selling K2.

During the week of 7-9-12 affiant was contacted by confidential informant #411 (hereinafter referred to as ci). CI stated that he/she could arrange a purchase of the illegal synthetic marijuana called k-2. CI stated he/she could make the buy from the clerk at the Citgo gas station located at 46555 Van dyke in Shelby twp.

Affiant met with ci at a prearranged location and searched the ci and ci's vehicle with negative results. Writer gave ci prerecorded Shelby twp. buy funds to make the purchase. ci was then followed directly to 46555 van dyke.

D/Sgt Schmittler observed as ci walked into the Citgo gas then walked out getting back into his/her vehicle. D/Sgt Schmittler observed David Dabish w/m 12-28-72 exit the Citgo gas station walk over to ci's vehicle and give ci k-2 and ci then gave Dabish the Shelby Twp buy funds. D/Sgt Schmittler observed David Dabish make additional k2 transactions in the Citgo lot.

CI then drove directly back to the prearranged location where ci and ci's vehicle were searched again with negative results. CI gave writer 2 packets of hysteria K2 which he/she stated was purchased from David Dabish with the Shelby Twp buy funds

During the week of 7-16-12 affiant was contacted by confidential informant #411 (hereinafter referred to as ci). CI stated that he/she could arrange a purchase of the illegal synthetic marijuana called k-2. CI stated he/she could make the buy from the clerk at the Citgo gas station located at 46555 Van Dyke in Shelby twp.

Affiant met with ci at a prearranged location and searched the ci and ci's vehicle with negative results. Writer gave ci prerecorded Shelby twp. Buy funds to make the purchase. Ci was then followed directly to 46555 Van Dyke.

D/Sgt Schmittler observed as ci walked into the Citgo gas then walk out getting back into his/her vehicle. D/Sgt Schmittler observed Audrick Dabish w/m 8-11-94 exit the Citgo gas station walk over to ci's vehicle and give ci k-2. The ci then gave Audrick Dabish the Shelby Twp buy funds.

CI drove directly back to the prearranged location where ci and ci's vehicle were searched again with negative results. CI gave writer 2 packets of hysteria k2 which he/she stated was purchased from Audrick Dabish with the Shelby Twp buy funds

During the week of 7-23-12 affiant was contacted by confidential informant #411 (hereinafter referred to as ci). CI stated that he/she could arrange a purchase of marijuana from Dabish " Jeff" Dabish at the Woodstock tobacco shop located at 46699 Van dyke in Shelby twp.

Affiant met with ci at a prearranged location and searched the ci and ci's vehicle with negative results. Affiant gave ci prerecorded Shelby twp. Buy funds to make the purchase. CI was then followed directly to 46699 van dyke.

Det Heisler observed as ci walked into the Woodstock tobacco shop and exit a short time later. CI walked out getting back into his/her vehicle. The ci then drove directly back to the prearranged location where ci and ci's vehicle were searched again with negative results. CI gave Affiant marijuana which he/she stated was purchased from Dabish "Jeff" Dabish with the Shelby Twp buy funds.

Affiant field tested the marijuana using Nark II test kit 5 obtaining positive results.

During the week of 9-25-12 affiant was contacted by confidential informant #411 (herein after referred to as ci). CI stated that he/she could arrange a purchase of the illegal synthetic marijuana called k-2. CI stated he/she could make the buy from Dabish "Jeff" Dabish in Sterling Heights.

Affiant and agents from DEA met with ci at a prearranged location. Affiant searched the ci and the ci's vehicle with negative results. Affiant gave the ci prerecorded DEA buy funds to make the purchase. Ci was then followed directly to the Knights Inn at 7887 17 mile in Sterling Heights.

TFO Debottis observed as ci walked into room 246 then walked out a short time later getting back into his/her vehicle. The ci then drove directly back to the prearranged location where ci and ci's vehicle were searched again with negative results. Ci gave writer k2 which he/she stated was purchased from Dabish "Jeff" Dabish with the DEA buy funds.

TFO Debottis advised affiant after ci left he observed Dabish "Jeff" Dabish and Audrick Dabish exit room 246 both looking up and down the parking lot. There was a gray Cadillac CTS MI- CGA-7888 in front of room 246 that affiant has seen Dabish Dabish in frequently.

During the week of 10-08-12 writer was contacted by confidential informant #411 (herein after referred to as ci). CI stated that he/she could arrange a purchase of the illegal synthetic marijuana called k-2. CI stated he/she could make the buy from the Dabish "Jeff" Dabish in the area of 18 mile and Dequindre.

Writer met with ci at a prearranged location and searched the ci and the ci's vehicle with negative results. Writer gave the ci prerecorded Shelby Twp buy funds to make the purchase. CI was then followed directly to 18 mile and Dequindre where Det R. Heisler observed Dabish Dabish get out of his Cadillac CTS MI-CGA-7888 and enter ci's vehicle.

Dabish "Jeff" Dabish exited ci's vehicle in less than a minute returning to his Cadillac then exiting the area. The ci then drove directly back to the prearranged location where ci and ci's vehicle were searched again with negative results. CI gave writer 4 different

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brands of k2/potpourri which he/she stated was purchased from Dabish "Jeff" Dabish with the Shelby Twp buy funds.

The k2/synthetic marijuana was sent to the MSP crime lab and tested positive for AM-2201 and MAM 2201 which are both schedule 1 narcotics.

Affiant was contacted over the past 48 hours by confidential informant #411 (herein after referred to as ci). Ci stated that he/she could arrange a purchase of the illegal synthetic marijuana called k-2. Ci stated he/she could make the buy from the Dabish Dabish in the area of Mound and M59.

Affiant met with ci at a prearranged location and searched the ci and the ci's vehicle with negative results. Writer gave the ci prerecorded Shelby Twp buy funds to make the purchase. CI was then followed directly to mound and M59 where Agent Joyner observed Dabish Dabish get out of his Cadillac CTS MI-CGA-7888 and enter ci's vehicle. Dabish Dabish exited ci's vehicle in less than a minute returning to his Cadillac before exiting the area.

The ci then drove directly back to the prearranged location where ci and ci's vehicle were searched again with negative results. Ci gave writer several different brands of k2/potpourri which he/she stated was purchased from Dabish Dabish with the Shelby Twp buy funds. Writer transported the k2 back to Shelby Twp PD where it was logged into property.

DEA agents and Shelby Twp narcotics unit surveilled Dabish directly to the Dabish family owned Citgo gas station at 46655 van dyke. Dabish was observed walking into the gas station and opening the cash register. Dabish placed money made from the illegal K2 sale into the cash register. Dabish exited Citgo put gas in his Cadillac and was then surveilled throughout the West Bloomfield area before returning to his residence at 5444 Paul Louis in West Bloomfield.

Affiant ran Dabish Jeffrey-Adel Dabish 8-8-77 through lein and it shows an address of 5444 Paul Louis Ln. in West Bloomfield. Dabish was charged in 1998 by Farmington Hills with a Felony Traffic offense. Dabish pled guilty to Fleeing and Eluding 3rd, Possession of Marijuana and operating-no license/multiple licenses.

Dabish was charged in 1998 by MSP- CID with Felony controlled substance. Dabish was found guilty of Attempt -- Misdemeanor Controlled Substances (Cocaine, Heroin or another narcotic less than 25 grams.

Dabish was charged in 2002 by Sterling Heights with Dangerous Drugs. Dabish pled guilty to Poss. of Drug Paraphernalia.

Dabish was charged in 2002 by White Lake Twp 4 counts of Felony Forgery and counterfeiting. Dabish pled guilty to Felony Uttering and Publishing and was sentenced to 34 months to 28 years in State Prison.

Dabish was charged in 2004 by Utica Police with Felony Larceny. Dabish pled guilty to Misdemeanor false Pretenses-\$200-\$1000.

Dabish was charged in 2010 in Walled Lake with Larceny. Dabish Pled guilty to Larceny \$200-\$1000.

Affiant ran David Edel Dabish 12-28-72 through Lein and it shows David's address as 2200 Edgestone in Sterling Heights. David was charged in 1994 in Farmington Hills with a Felony Weapons charge. David Pled guilty to Felony Weapons-Carrying Concealed.

David Dabish was charged in 1996 by MSP-TET with Felony Tax/ Revenue. David pled guilty to Felony Tobacco Products Tax Act Violation.

David Dabish was charged in 2004 by MSP SECID with Misdemeanor Gambling. David was Found Guilty of Misdemeanor Gambling- Disassociated Person Trespassing.

David Dabish was charged in 2006 by Shelby Twp Police with Assault excluding sexual and Public peace violations. David pled guilty to Assault and Public Peace was dismissed.

David Dabish was charged in 2010 by MSP SECID with 6 counts of Felony Tax/Revenue. David pled guilty to Attempt-Felony Tobacco Products Tax Act Violation.

David Dabish was charged in 2012 by Sterling Heights PD with 1 count Public Peace and 1 count Obstructing Police. David Pled guilty to Disorderly Person.

Audrick David Dabish 08-11-94 has made a delivery of K2 to CI. Audrick works at Woodstock Tobacco and Citgo gas station and is the Son of David Dabish. Affiant arrested Audrick in 2012 for Disorderly Conduct and Minor in possession of tobacco.

The Citgo gas station and Woodstock Tobacco are both owned by the Dabish Family according to Shelby Twp records. Shelby Twp Narcotics Unit has bought marijuana and Synthetic marijuana from members of the Dabish family from both businesses and other locations. Affiant believes this proves that the Dabish family is part of an illegal ongoing enterprise.

The Citgo gas station and Woodstock Tobacco are both owned by the Dabish Family. Shelby Twp Narcotics Unit has bought marijuana and Synthetic marijuana from members of the Dabish family from both businesses and other locations. Affiant believes this proves that the Dabish family is part of an illegal ongoing enterprise.

Based on the above facts and Affiants experience it is Affiants belief that additional quantities of Synthetic Marijuana may be located at 2200 Edgestone Dr., Sterling Heights, Macomb County Michigan, therefore this request to search is being made.

This is an ongoing covert investigation and the safety of persons involved and/or integrity may be harmed if the affidavit is made public at this time. Therefore, Affiant requests this affidavit remains suppressed for a minimum of fifty-six days or until so ordered by the court.

Further Affiant sayeth not.

Reviewed on _____ by

Prosecuting Official

Affiant

[Handwritten Signature]

Subscribed and sworn to before
me on

10/30/12 5:50 p.m.

[Handwritten Signature]
Judge/Magistrate

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

- - -

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Case No. 13-1880-FH

DAVID ADEL DABISH,

Defendant.

_____ /

PROCEEDINGS

BEFORE THE HONORABLE EDWARD A. SERVITTO, JR., JUDGE

Mount Clemens, Michigan - May 4, 2015

APPEARANCES:

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TABLE OF CONTENTS

Page
WITNESSES:
(No witnesses offered)

EXHIBITS:
(No exhibits offered)

Received

B 2

1 Mount Clemens, Michigan

2 May 4, 2015

3 At about 10:44 a.m.

4 - - -

5 THE COURT: People versus Dabish.

6 MR. DAILEY: William Dailey here on behalf of
7 the People.

8 MR. MUAWAD: Your Honor, good morning. Elias
9 Muawad on behalf of David Dabish who's here sitting
10 down.

11 MR. DAILEY: Your Honor, Mr. Kramer is also
12 here regarding co-defendant Dabish Dabish. I think
13 the motion at this point primarily applies to David
14 Dabish though.

15 THE COURT: All right.

16 MR. MUAWAD: Judge, we been spending the last
17 hour and a half going through the dates, and this is
18 what we show. There are no tests concerning David
19 Dabish or the children to get into the home. We've
20 confirmed that. Mr. Dailey and Sergeant Titchenel
21 confirmed that, and I believe that regarding the
22 search warrant to the home that I do not think they
23 had probable cause to get into the house.

24 We also know --

25 THE COURT: Mr. Dailey.

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1 MR. DAILEY: Judge, there were, one, two,
2 three, four, five, six controlled purchases of
3 suspected K-2 or what was being called K-2 in this
4 case. Several of the suspected purchases of K-2 did
5 not go to a crime lab, either DEA or the state police.
6 One in fact did and we'll let you know that was a
7 first purchase of suspected, what's called K-2
8 suspected synthetic marijuana, that was from David
9 Dabish. That went to the Michigan State Police crime
10 lab and came back negative for any controlled
11 substance.

12 MR. MUAWAD: Right.

13 MR. DAILEY: The purchase was made by a
14 confidential informant. There were, in that case,
15 there were two packets of suspected K-2 done. It was
16 a hand to hand in the parking lot outside the business
17 of the Citgo gas station, and then the affidavit goes
18 on to say there is a police officer who observes
19 suspect David Dabish making additional hand to hand
20 transactions of suspected K-2 in the Citgo parking
21 lot. And then they detail going back and receiving
22 the suspected K-2.

23 THE COURT: But here's what we have, if it is
24 true.

25 MR. DAILEY: It is true.

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1 THE COURT: We don't have the delivery of a
2 controlled substance.

3 MR. DAILEY: Correct. In fact we know it's
4 not a controlled substance, according to the lab.

5 THE COURT: So there is really no probable
6 cause that a controlled substance is at the residence.

7 MR. DAILEY: Well, that's -- I want to let
8 you know another one too because I'm going to make a
9 similar argument, but I'll get right to it. The tip
10 is that these individuals are selling K-2, which is
11 suspected synthetic marijuana. During the course of
12 their investigation they make controlled purchases
13 from David Dabish, Dabish Dabish and it's Audra Dabish
14 at different locations. The transactions are hand to
15 hand transactions out in a parking lot, at a hotel.
16 And, Judge, as you know, it is also a felony in the
17 State of Michigan to distribute imitation controlled
18 substance.

19 THE COURT: No question.

20 MR. DAILEY: Correct.

21 THE COURT: No question that's true. But if
22 -- what are you searching for when you're not
23 searching for -- you get a search warrant on the basis
24 that there is a controlled substance, when in fact
25 there is no basis for the controlled substance

1 probable cause?

2 MR. DAILEY: There is a basis, though. In
3 looking right at the search warrant to believe that on
4 multiple different occasions they are selling K-2 or
5 suspected K-2 which is suspected synthetic marijuana
6 to an informant at different locations, these are hand
7 to hand transactions and they are called K-2, and
8 anyplace that an officer could look for imitation K-2
9 or suspected K-2, they might likely find the real
10 stuff.

11 THE COURT: But the problem is the
12 representation was that it was K-2, that's the
13 problem, and in fact there is not a basis for it.

14 MR. DAILEY: The representation in this case,
15 Judge, was that it was K-2. There's one specific
16 reference in the affidavit that, and I'm going to find
17 that for you -- well, there is one that was a positive
18 field test for marijuana, but there is another one
19 where there was specific reference given to Michigan
20 State Police crime lab testing positive for controlled
21 substance, doesn't relate to his client, it does not
22 relate to David directly.

23 To the extent that David and Dabish Dabish
24 and Audra Dabish are family members and they are
25 selling this stuff at multiple different locations in

B 6

1 town, tested positive at this time and on this date
2 the affidavit frankly is silent as to the other buys,
3 but I'm telling you in fact it was negative on one
4 occasion, but I don't think that obviates whether or
5 not there was probable cause for the police to believe
6 there was imitation controlled substance feloniously
7 being sold around the county.

8 THE COURT: But the purpose of going into the
9 home was not to find imitation controlled substance.

10 MR. DAILEY: Correct. It was to find K-2.

11 THE COURT: And there is no basis to
12 determine that K-2 was actually ever sold.

13 MR. DAILEY: The K-2 was represented by David
14 Dabish to the informant.

15 THE COURT: In fact the only information that
16 you have is that it was not in fact K-2.

17 MR. DAILEY: Once it was not and once it was
18 nothing. Other times with co-defendant it was
19 positive, his brother. The synthetic marijuana, Judge
20 --

21 THE COURT: It was positive for the brother
22 at what time frame?

23 MR. DAILEY: It was positive for the brother
24 -- well, one time it was marijuana that was positive.
25 And then it was positive during the week of 9-25 and

B 7

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then it was positive during the week of 10-8.

THE COURT: And the search warrant was signed when?

MR. DAILEY: 10-30.

THE COURT: So, then your argument is -- all right. He's selling imitation controlled substance, your client. His brother is selling marijuana and an actual controlled substance.

MR. DAILEY: Yes.

THE COURT: How does the crime of the brother relate to the -- how do you become responsible for your brother's wrongdoing? You can't. Can't do it. The search of his home just -- there's no basis for his home.

MR. DAILEY: Is the Court specifically finding then that -- and I don't know, maybe you want to read the affidavit before you make that finding.

THE COURT: Let me read the affidavit.

MR. DAILEY: I did write notes on it. So I want you to understand I wrote notes on what the positive and negative tests were. Please don't let that influence you --

MR. MUAWAD: I don't care.

MR. DAILEY: -- use our representations.

MR. MUAWAD: Right. I'll tell you that the

1 warrant and while you're reading it is based upon
2 controlled substance, not an imitation substance. But
3 take your time.

4 And my facts and my motion mirror the facts
5 alleged in the search warrant, affidavit.

6 THE COURT: There was nothing positive taken
7 from the Citgo station.

8 MR. MUAWAD: Correct.

9 MR. DAILEY: Nothing that tested positive,
10 Judge, that's correct.

11 THE COURT: And Mr. Dabish, David Dabish's
12 relationship is part owner of the Citgo gas station,
13 nothing else. There's no other connection other than
14 family. There's nothing further to warrant a search
15 of his residence. There's nothing to here that -- a
16 search, a search warrant was obtained for controlled
17 substance violations.

18 MR. DAILEY: Yes.

19 THE COURT: David Dabish is not, as a matter
20 of fact, involved in the distribution of controlled
21 substances by the facts in the affidavit.

22 I mean they said -- no, there's no basis to
23 go into -- let's assume they had said in the affidavit
24 that the test results were negative, that he's selling
25 artificial controlled substance. That's not a basis

1 to go into someone's home to find artificial
2 controlled substance. However, it would be a basis to
3 find maybe records, computer records, and things of
4 illegal transactions associated with the sale,
5 artificial controlled substances. Not a basis to go
6 look for controlled substances.

7 MR. DAILEY: I see what you're saying. The
8 first time you said it, I think you said if we had
9 indicated he was selling imitation controlled, and I
10 like imitation, because that's the word in the
11 statute, that there would be no basis to look for
12 imitation controlled.

13 THE COURT: I think you can go look for
14 imitation controlled.

15 MR. DAILEY: Fair enough. That's not what I
16 heard the first time you verbalized it.

17 THE COURT: But what is imitation controlled?
18 I mean that's -- I guess you could find imitation
19 controlled substance, packaging materials.

20 MR. DAILEY: It looks just like K-2. It's
21 the same thing. It's being sold as K-2. It's being
22 sold in a parking lot, sold multiple times in a
23 parking lot. There is a business right there, the
24 Citgo, the affidavit indicates you have a person
25 coming out of the business doing hand to hand

1 transactions in a parking lot outside the business,
2 and it fits the definition in the public health code,
3 by the way under the controlled substances, Article 7
4 controlled substances, of distribution of imitation.

5 And part of the logic I guess I'm asking you
6 and the legal analysis I'm asking you to employ, it's
7 similar to what the Michigan Supreme Court did in
8 People versus Keller where you have police officers
9 saying, "Look, we got a tip that someone was selling
10 marijuana," and the police go and they do a trash pull
11 and they find a pizza box with some marijuana stems
12 and seeds in it, for lack of a better, that's the main
13 part of what they found, indicating there was
14 marijuana distribution going on at this residence.

15 So they then go get a search warrant to look
16 for evidence of distribution and delivery of
17 marijuana. The Court of Appeals and Supreme said --
18 technically the Supreme Court said, "Look, there might
19 not -- that might not constitute evidence of
20 distribution of marijuana, which is what you were
21 going to look for, but it does show there was crime
22 potentially going on there and there's probable cause
23 to believe that there is marijuana there." So they
24 could go and look where they might find marijuana.
25 And that's when they said it's okay.

1 I'm asking you to use -- employ a similar
2 analysis. You have somebody selling K-2, which I
3 think K-2 is actually listed in the statute, but it's
4 not a controlled substance.

5 THE COURT: I don't know that he's selling
6 K-2.

7 MR. DAILEY: He's selling it as K-2 to the
8 informant.

9 THE COURT: Okay.

10 MR. DAILEY: And to other people, at least in
11 surveillance, taking the affidavit for what it's
12 worth.

13 THE COURT: But it's not actual K-2.

14 MR. DAILEY: Well, K-2 dope or drugs or
15 illegal -- K-2 is not the controlled part of it. He's
16 selling it as K-2. The public knows it's K-2. The
17 public ingests it to get high. The actual controlled
18 substance, I think were MAM2201, AM2201. There's a
19 number of JWH's that were found in the lab reports,
20 Judge.

21 That's where the imitation part of it comes
22 in. If you're selling K-2 to an informant or selling
23 it as K-2 in a parking lot hand to hand, two packs of
24 it, and doing it outside these locations as opposed to
25 maybe buying your Orange Crush out of the cooler at

1 the Citgo gas station, there's a strong argument,
2 Judge, and strong belief, at least to a probable
3 cause, for a magistrate to find that that is an
4 appropriate search to go look for that stuff.

5 MR. MUAWAD: Look, Judge, he's getting away
6 from the fact that when you look at the four corners
7 of the warrant, it says controlled substance. You
8 can't rewrite the warrant today and say controlled
9 substance and imitation controlled substance. They
10 don't have it. It's not in the four corners of the
11 affidavit.

12 Now, the case law he cites where they found
13 marijuana in the trash, yeah, that will give him
14 probable cause to go into the house, but because none
15 of the drugs dealing with Dave Dabish of the alleged
16 drugs were tested, they don't have probable cause and
17 you can't rewrite this affidavit today and say, "Wait
18 a minute. We have a separate theory now and it's
19 imitation controlled substance." It's not in the
20 affidavit. They should have put that in the affidavit
21 if they were going to go there for both controlled
22 substance and/or imitation controlled substance.

23 And that's what I think he's trying to do and
24 he's making a nice argument. But when you look at
25 this affidavit, it's controlled substance any day of

1 the week.

2 MR. DAILEY: It does say that. It absolutely
3 says that, and I'm asking you to consider, Judge -- in
4 this case they are asking you to suppress evidence. A
5 Court suppresses evidence when there is something that
6 the police did wrong and violated a fourth amendment
7 or a Michigan State Constitution which is analogized
8 similarly to the fourth amendment in every case to my
9 knowledge. In fact, I think our Supreme Court said we
10 look at it in the Michigan State fourth amendment.

11 What did the police do wrong here
12 constitutionally? They are out buying suspected
13 synthetic marijuana. In this case some of it tested
14 positive. None of it tested positive for David
15 Dabish, absolutely didn't. I can't fight that.

16 But they didn't constitutionally do anything
17 wrong here to warrant suppression. They still
18 investigated and obtained evidence of a public health
19 code 333.7341, controlled substance, Article 7, by
20 violation, imitation as opposed to actual. Both are
21 felonies. There's a strong case that the place they
22 wanted to search would lead to evidence being found of
23 those exact items.

24 There's nothing to warrant suppression here.
25 The police didn't do anything wrong. So, I know

1 Sergeant Titchenel is in the courtroom, his writing
2 probably could have been better, maybe he should have
3 put in and/or imitation controlled substance--

4 THE COURT: But the problem is they only knew
5 of the one transaction as being negative. The others,
6 I take it, they assumed were not negative. I don't
7 know.

8 MR. DAILEY: That might be for testimony. I
9 can tell you what I think he'd say if you swore him
10 in. He'll tell you yeah, he assumed that.

11 THE COURT: I would assume that's what he
12 would testify to.

13 MR. DAILEY: Yes, probably the next search
14 warrant Sergeant Titchenel writes similar to this will
15 say and/or imitation. We have marijuana that tested
16 positive.

17 THE COURT: The problem that you have is you
18 can't field test K-2.

19 MR. DAILEY: That's correct.

20 THE COURT: So, you don't have a field test
21 that will demonstrate whether it's the actual
22 controlled substance or an imitation controlled
23 substance, and David Dabish's involvement is only of
24 those K-2 products where there was either a negative
25 or no test associated with it.

1 But nonetheless you have the representation
2 that they are the drug from David, according to the
3 confidential informant, that you're buying a
4 controlled substance.

5 Assuming there is no test even for heroin or
6 marijuana or anything else, you have confidential
7 informants that go in and say, "I'm buying this," and
8 charge an amount of money, the drug is not tested but
9 officers come back and say the confidential informant
10 went in, offered a hundred dollars to buy marijuana,
11 was given a package and took the hundred dollars with
12 the representation it was marijuana. Would that be
13 sufficient probable cause absent any controlled
14 substance, I guess is the question, or the magistrate
15 makes the determination there's probable cause,
16 evidence of a crime taking place.

17 MR. MUAWAD: No, because there is a certain
18 statute and you're talking about imitation controlled
19 substance.

20 THE COURT: No, I'm talking about a search
21 warrant in general.

22 MR. MUAWAD: I see. No.

23 THE COURT: You don't think that an officer
24 based on a confidential informant obtaining a drug,
25 obtaining a substance that the seller represents to be

1 a controlled substance, takes the money for it with
2 the representation it's a controlled substance, for
3 the officer to go to the magistrate and say,
4 "Magistrate, the conformant informant went in, bought
5 this, with the understanding that I want to buy
6 marijuana," that the defendant saying, "Here's your
7 marijuana. Give me 100 bucks," or ten bucks or
8 whatever the case may be, that that would not be
9 sufficient for an examining magistrate?

10 MR. MUAWAD: Without a field test of lab
11 report, no.

12 THE COURT: Where is the test required is the
13 question. The test is not required. This Court is
14 satisfied that a test is not required. It would be
15 sufficient.

16 The problem I have is it's a
17 misrepresentation with the warrant that it is a
18 controlled substance. That's the problem.

19 MR. MUAWAD: That's what I was going to get
20 to. That's the problem it has in there.

21 THE COURT: And I can't put myself in the
22 position of the magistrate. The magistrate only knows
23 -- would I have signed the warrant on the basis that
24 it wasn't tested in light of all the information
25 that's contained in the warrant? I would.

1 MR. DAILEY: Again, I know you're the one
2 reviewing this obviously, Judge. The search warrant
3 itself has one line and it's a stand alone line and
4 it's after the purchase that took place, and it's the
5 purchase that took place after 10-8, Judge, and the
6 purchase that took place after the week of 10-8,
7 there's a stand alone line and it indicates, "The K-2
8 synthetic marijuana was sent to the M.S.P. crime lab
9 and tested for positive AM 2201 and MAM 2201," which
10 are both schedule one narcotics.

11 THE COURT: And those were sold by David.

12 MR. DAILEY: Those were sold by Dabish
13 Dabish.

14 MR. MUAWAD: The brother.

15 MR. DAILEY: The brother.

16 MR. MUAWAD: Yeah.

17 MR. DAILEY: What I want to tell you though
18 is it isn't that Sergeant Titchenel after each -- and
19 that's accurate, he has the lab report to back up
20 that. He did not indicate after each purchase that
21 they were -- they tested positive at the lab and
22 another controlled buy, they tested positive at the
23 lab. The affidavit is actually silent as to all of
24 them except for the one buy that tested positive at
25 the lab, and it did test positive at the lab.

1 So going under the misrepresentation idea,
2 and I understand we're exploring how it's put into the
3 affidavit, that statement is backed up by lab report.
4 I'm representing that to you even though he's not
5 under oath.

6 MR. MUAWAD: I think the Judge is talking
7 about Dave Dabish, my client, not Jeff Dabish.

8 MR. DAILEY: He's talking about what's
9 represented in the affidavit by the officer in terms
10 of it being a misrepresentation. It's represented in
11 there one time it went to the crime lab and tested
12 positive. It isn't represented after the previous
13 controlled buys, nor is it represented after the next
14 controlled buy, because there was one after that, and
15 it doesn't say after that it tested positive either.

16 THE COURT: Let me ask you. Were any of
17 David's sales confirmed to --

18 MR. DAILEY: I debated, frankly, sending it
19 to the crime lab now. I talked with people in my
20 office that I respect their opinion. One of them was
21 confirmed negative, and I don't think any others were
22 sent to the lab.

23 MR. MUAWAD: But it wouldn't matter, Judge,
24 as I said in the supplement brief, it has to form the
25 basis for the probable cause. You can't test it now