Circuit Court for Howard County
Case No.: 13-K-18-058705

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1039

September Term, 2018

DAMON EICHELBERGER

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: July 8, 2019

Appellant, Damon Eichelberger, was indicted in the Circuit Court for Howard County, Maryland, and charged with possession of heroin with intent to distribute and possession of cocaine with intent to distribute. Following the denial of his motion to suppress evidence, appellant was found guilty on both counts after he elected to proceed on a not guilty plea on an agreed statement of facts. After appellant was sentenced to two concurrent terms of sixteen years, with credit for time served, he timely appealed and presents the following question for our review:

> Did the circuit court err in ruling that there was a substantial basis for finding probable cause to issue a search warrant for Appellant's residence, and in the alternative, that officers relied on the search warrant in good faith?

For the following reasons, we shall affirm.

BACKGROUND

The Application for a Search and Seizure Warrant at issue in this case identified the premises to be searched as 12231 Little Patuxent Parkway, Apartment I, Columbia, Maryland 21044 (Howard County), located on the third floor of a three story "open access apartment building." The Affidavit in support of the Application was prepared by two co-affiants from the Howard County Police Department, namely, Detective Corporal Erik Reid and Detective First Class Brian Hartman. After detailing their extensive education, training and experience, which is not challenged or in dispute, the affiants generally noted, *inter alia*, that: drug traffickers keep proceeds of drug sales and maintain records relating to the distribution of narcotics; it is common for drug traffickers to keep these records and proceeds in secure locations in their residences; drug traffickers will keep drugs and other

paraphernalia inside their residences, vehicles, and on their person; and, drug traffickers will use firearms to protect their illegal drugs and/or money.

The Affidavit then provided extensive details about a police investigation concerning the distribution of narcotics in Columbia, Maryland, from as early as June 2016 through and including December 21, 2017. This investigation involved: tips from three reliable confidential informants (CI#15-020, CI#16-014, and CI#17-022); covert surveillance by Howard County Police; a controlled buy in December 2017 involving one of the reliable confidential informants (CI#17-022) and appellant; a canine scan of the exterior of appellant's residence by a K9 unit; and, a check of appellant's criminal history revealing multiple arrests for several different narcotics-related and violent offenses.

In brief, according to the Affidavit, from June 2016 to June 2017, Detective Hartman received information from CI#15-020 and CI#16-014 that one Jason Lamont Lewis ("Lewis") and a person identified as "IKE" were selling heroin and crack cocaine in the Harpers Choice area of Columbia, specifically, a playground located near Lewis's residence. Both of these informants positively identified a photograph of appellant as the person known as "IKE." CI#16-014 also informed Detective Hartman that appellant lived with the mother of his child at 12231 Little Patuxent Parkway, Columbia, Maryland, in the third floor apartment located on the left-hand side of the building. This information was independently corroborated by Detective Corporal Reid, who conducted several computer checks of MVA and BGE records, to confirm that appellant resided at 12231 Little Patuxent Parkway.

Beginning in October 2017, Detective Hartman began receiving information from CI#17-022, confirming that "Jason" and "IKE" were both selling marijuana, crack cocaine and heroin. CI#17-022 positively identified photographs of Lewis and appellant as the persons he knew as "Jason" and "IKE." In November 2017, CI#17-022 further informed Detective Hartman that a third individual, known as "YAK" and identified as John Willie Kennedy, Jr. ("Kennedy"), was selling marijuana with appellant and Lewis from Kennedy's residence.

In December 2017, detectives installed a covert surveillance camera in order to capture the front doors of 5611 and 5613 Harpers Farm Road, which the affidavit described as being in the Fall River Terrace area, and known to be a "high drug trafficking area" and located just approximately 50 feet east of a secluded "tot-lot" area. The cameras recorded approximately 256 hours of covert surveillance. A review of this surveillance led Detective Corporal Reid to conclude that Kennedy resided at 5611 Harpers Farm Road and Lewis resided at 5613 Harpers Farm Road. The Affidavit notes that there were over 100 incidents where individuals would enter 5611 Harpers Farm Road for visits that lasted less than five minutes. The Affidavit provided that "D/CPL Reid knows from his training, knowledge and experience that brief visits such as these are consistent with drug transactions." On numerous occasions, the surveillance video showed Lewis or appellant enter 5611 Harpers Farm Road for short visits, lasting less than five minutes. According to the Affidavit, "D/CPL Reid recognized these short trips out of the townhome to be consistent with CI information that [appellant] conducts CDS transactions outside near the tot-lot area. These observations were consistent with CI information that Lewis, Kennedy and [appellant]

were all involved in this conspiracy to distribute CDS." Detective Corporal Reid reached a similar conclusion with respect to Lewis.

In December 2017, the detectives met with CI#17-022 in order to conduct a controlled buy of crack cocaine and marijuana from the "tot-lot" area previously described. The Affidavit then provides the following details:

> D/CPL Reid and DFC Hartman dropped CI#17-022 off in the area. CI#17-022 walked on foot to the area of the tot-lot. CI#17-022 was kept under constant surveillance from the time the CI was dropped off. DFC Brown observed CI#17-022 walk to the area of the tot-lot, where visual is briefly lost. DFC Brown then observes CI#17-022 walk back on to the foot path a short time later (less than 30 seconds). CI#17-022 was kept under constant surveillance as the CI walked back, and was picked up by D/CPL Reid. CI#17-022 provided a baggie with an amount of off-white rock like substance and an amount of greenish brown vegetable matter to D/CPL Reid. Through his training, knowledge and experience, D/CPL Reid recognized the off-white rock like substance to be suspected crack cocaine and the greenish brown vegetable matter to be suspected marijuana. D/CPL Reid observed that the amount of marijuana and crack cocaine was consistent with the amount of US Currency that CI#17-022 was provided. The CI was immediately searched by Detective(s) and found to be free of any other narcotics or contraband. CI#17-022 stated that a subject who the CI knows as "IKE" sold him/her the CDS. A known photograph of Damon Gerard Eichelberger (this photograph was free of names or identifiers) was shown to CI#17-022, who positively recognized the subject as "IKE".
>
> Due to the difficulty in conducting surveillance in this area, D/SGT Kreller was viewing the covert surveillance camera during this incident. D/SGT Kreller was able to observe a subject exit the front door of 5611 Harpers Farm Rd., just prior to CI#17-022 conducting the controlled buy. D/SGT Kreller was able to positively identify this subject as Damon Eichelberger from a provided MVA photograph. CI#17-022 had advised Detectives that Eichelberger was currently in a walking boot. D/SGT Kreller clearly observed that Eichelberger was wearing a walking boot on his right leg, via the covert surveillance camera.

Thereafter, on December 15, 2017, at approximately 8:30 a.m., Detective Corporal Reid and Detective Hartman conducted surveillance on 12231 Little Patuxent Parkway, Apartment I. The detectives saw appellant emerge from the building, but not any specific apartment, and then enter a silver Honda Accord. The detectives then conducted "rolling surveillance" of the appellant, who was the lone occupant and driver of the Honda, and followed him to several locations, including the Fall River Terrace parking lot. Three days later, on December 18, 2017, at approximately 8:40 a.m., Detective Corporal Reid observed appellant arrive at 12231 Little Patuxent Parkway driving a blue Acura TL with dark tinted windows. The detective saw appellant get out of the driver's seat and walk up to the third floor landing of the apartment building and quickly disappear from sight. The Affidavit then provided that "[t]he quickness with which Eichelberger disappeared from view was consistent with him entering the doorway of Apartment I."

The Affidavit also provided as follows:

> On 12/21/2017 at approximately 0430 hours D/CPL Reid and K9 Aronovic conducted a door scan of the third floor of 12231 Little Patuxent Parkway. This third floor consists of 4 apartments; I, J, K and L. K9 Aronovic directed K9 Barry to conduct open air sniffs of all doors, resulting in a positive alert for only Apartment I.

The Affidavit also included a criminal history for appellant, indicating that appellant had been previously arrested for multiple narcotics and handgun offenses, as well as armed robbery, kidnapping, first degree assault, second degree assault, and reckless endangerment. The Affidavit[1] concluded:

[1] The Search Warrant was signed by a judge on January 4, 2018.

> Your Affiants aver that an extensive and detailed evaluation of the total circumstances, as related above, taken into context with the police training and experience in criminal investigations of the Affiants, would lead a reasonable person to believe that probable cause exists and the items described on the face of this warrant are being concealed in the residence described on the face of this warrant.

After charges were filed in this case, the circuit court conducted a hearing on appellant's motion to suppress evidence. Appellant argued that there was no nexus between any alleged criminal activity and his residence, and therefore, no substantial basis for the magistrate to conclude that the warrant was supported by probable cause. The State responded that, considered under the totality of the circumstances, there was a substantial basis to support the warrant. Furthermore, even if the motions court were to disagree, the State argued the officers acted in good faith when executing the search warrant. In rebuttal, appellant contested the State's good faith argument and also suggested that probable cause had gone stale based on when the K9 unit alerted on the door to appellant's apartment and when the warrant issued in this case.

The motions court ultimately denied the motion to suppress, finding as follows:

> In this particular case, there was a CI 1520 who had provided reliable information in the past, said that the Defendant was selling controlled dangerous substances in the Fall River Terrace section of Columbia. And he identified the Defendant from a photo. The Defendant was selling heroin and crack cocaine in Harpers Choice. The same informant provided some additional information in February and March about the Defendant.
>
> Another informant, 1614, accurate in the past, said that the Defendant was selling crack, marijuana, and heroin in the Columbia area. And that the Defendant stays at 12231 Little Patuxent Parkway on the third floor, apartment on the left, and he identified the Defendant by a photograph.
>
> May and June, CI 1520 again informed the Defendant was dealing in the Fall River Terrace area and in October, CI 1722 provided information

that the Defendant was dealing in the Fall River Terrace area that in November he provided information the Defendant was selling heroin in the Fall River Terrace section of Columbia. And that the Defendant was working with others in the drug distribution efforts.

Also provided the Defendant was using 12231 as a residence. The pole camera apparently according to the application in the Fall River Terrace area, over a hundred people coming and going, staying five minutes or so.

It was a controlled buy informant with informant 1722 involving crack cocaine and marijuana reportedly sold by the Defendant to the CI in a controlled buy.

December 18th, 2017, surveillance indicated that the Defendant was associated with 12231 Little Patuxent Parkway, Apartment I, had been seen entering the apartment.

I do concede that the reference to the K9 door scan of the apartment, the positive alert, it doesn't specify that he positively alerted to the presence of CDS or that he was searched by K9 or K9 handler. I also note that the Defendant has a fairly significant criminal history.

But uh, the question was essentially the nexus between the uh, I don't think there was much argument on the evidence of a criminal activity. The argument focused primarily on the nexus between the criminal activity and the Little Patuxent Parkway apartment and whether there's a substantial basis for the District Court Judge responding that there was a nexus, a sufficient nexus for the search warrant.

Again, this is Judge Moylan again, "once the criminal nature of the network is established, the nexus challenge is largely one of identifying the primary residence of the operators." I don't think there was any significant challenge to the address being one that was utilized by the Defendant as a place where he stayed. And I also think it reasonable that perpetrators of distribution of CDS often times keep fruits and instrumentalities of their enterprise in their homes. There's a preference according to warrants and I think the District Court judge could reasonably conclude that the evidence of criminal activity in this particular case was substantial and they could therefore deduce based on reasonable assumptions that the Defendant would have evidence at his Little Patuxent Parkway residence.

I'm relying on *Holmes vs. State* and they cite *Mills*, 270 Maryland 262. And I would also say that even if that nexus were not, if I'm wrong assuming in arguendo that I was wrong about that, the officers nevertheless

> relied upon a warrant in good faith under *Leon* and that there was no unreasonable police behavior in relying about that particular warrant.
>
> So I do find that there was a substantial basis for the warrant and that even if that that's incorrect, which I don't think it is, there would be good faith. So I would also deny the Motion to Suppress on that ground, as long as we're altogether. . . .

According to the statement of facts in support of the not guilty plea, appellant was home inside the residence when the search warrant was executed. After appellant was told the reason for the search, he admitted that he possessed narcotics and that they were located in his clothing in a back bedroom. The apartment was leased by appellant's girlfriend, Chardell Longess. During the course of the search of appellant's bedroom, police recovered $717.00 in U.S. currency and a Maryland identification card in appellant's name inside a pair of pants. A winter jacket located nearby contained two Oxycodone pills, nineteen vials of heroin, and fifty-five small vials of cocaine. Paraphernalia used for narcotics distribution was also found in the closet of the bedroom. Had the case gone to trial, an expert would have testified that the quantity of heroin and cocaine seized, as well as the presence of paraphernalia and currency, were indicative of distribution. An expert would also have testified that messages retrieved from appellant's iPhone, following execution of a separate search warrant, indicated that the holder of the phone was engaged in the distribution of narcotics. Following his arrest, appellant made numerous statements acknowledging that he sold narcotics. We may include additional detail in the following discussion.

DISCUSSION

Appellant maintains that there was an insufficient nexus between the allegations in the affidavit and his residence and that there was not a substantial basis to uphold the search warrant on that ground. Appellant continues that the motion cannot be affirmed on the grounds of the good faith doctrine because the deficiency in the affidavit was apparent on its face. The State responds that there was a sufficient nexus to appellant's residence and there was a substantial basis for the magistrate to find that probable cause supported issuance of the search warrant. Further, the officers who executed the search warrant acted in good faith reliance on the magistrate's determination and the State concludes that we should affirm the court's denial of appellant's motion to suppress.

The Fourth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment, reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV; *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961) (incorporating the Fourth Amendment to apply to the states).

"Reasonableness within the meaning of the Fourth Amendment 'generally requires the obtaining of a judicial warrant.'" *State v. Johnson*, 458 Md. 519, 533 (2018) (citation omitted). And, that warrant must be supported by probable cause, which the courts have explained is "a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (quoting *Illinois v.*

Gates, 462 U.S. 213, 231 (1983)). Indeed, "[t]he probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Pringle*, 540 U.S. at 371; *see also State v. Johnson*, 458 Md. at 534 ("It is, moreover, a 'basic and well-established principle[] of law' that courts reviewing a probable cause determination are not to view each fact 'in isolation,' but rather 'as a factor in the totality of the circumstances'") (citations omitted). Ultimately, "'[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt' . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized[.]" *Pringle*, 540 U.S. at 371 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

"A judicially issued search warrant is presumptively valid, and the burden is allocated to the defendant to rebut that presumed validity. A mere assertion is not an effective rebuttal." *Wood v. State*, 196 Md. App. 146, 164 (2010), *cert. denied*, 418 Md. 192 (2011). As the Supreme Court explained:

> We also have said that "[a]lthough in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," [*United States v.*]*Ventresca*, 380 U.S. [102,]109, 85 S.Ct. [741,]746 [(1965)]. This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

Illinois v. Gates, 462 U.S. at 237 n.10; *see also Massachusetts v. Upton*, 466 U.S. 727, 732-33 (1984) (reversing lower court's ruling invalidating a search warrant on grounds that anonymous informant was not credible, because lower court applied the wrong standard of

review to be accorded to the warrant).

Accordingly, when confronted with whether a search warrant is legal, the question ordinarily is "whether the issuing judge had a substantial basis to conclude that the warrant was supported by probable cause." *Greenstreet v. State*, 392 Md. 652, 667 (2006) (citation omitted). To determine whether the issuing judge had a "substantial basis," appellate courts do not apply "a *de novo* standard of review, but rather a deferential one." *Id.*; *accord Patterson v. State*, 401 Md. 76, 89-90 (2007) (discussing appropriate standard of review), *cert. denied*, 552 U.S. 1270 (2008); *Carroll v. State*, 240 Md. App. 629, 646-47 (2019); *see also State v. Faulkner*, 190 Md. App. 37, 47 (2010) (acknowledging that the Supreme Court has indicated that over-scrutiny of warrants may lead police officers to "eschew the warrant process altogether" and that the Court has dictated that "their validity be upheld in 'doubtful or marginal cases.'") (quoting *Illinois v. Gates*, 462 U.S. at 237 n.10); and *Ramia v. State*, 57 Md. App 654, 660 (discussing *Illinois v. Gates* leaving no room for doubt that reviewing courts "have no business second-guessing the probable cause determinations of warrant-issuing magistrates by way of *de novo* determinations of their own"), *cert. denied*, 300 Md. 154 (1984).

This Court has explained what is meant by the "substantial basis" standard of review:

> The substantial basis standard involves "something less than finding the existence of probable cause," and "is less demanding than even the familiar 'clearly erroneous' standard by which appellate courts review judicial fact finding in a trial setting."

State v. Coley, 145 Md. App. 502, 521 (2002) (citations omitted); *see also Moats v. State*,

230 Md. App. 374, 391 (2016) ("The evidence necessary to demonstrate a "substantial basis" is less than that which is required to prove 'probable cause'") (citation omitted), *aff'd*, 455 Md. 682 (2017). Further:

> Thus, while the "clearly erroneous" test demands some legally sufficient evidence for each and every element to be proved — to wit, that a *prima facie* case be established — *Illinois v. Gates* rejected such a rigorous standard for establishing probable cause and opted instead for a "totality of circumstances" approach wherein an excess of evidence as to one aspect of proof may make up for a deficit as to another. *Illinois v. Gates*, 462 U.S. at 235, 103 S.Ct. at 2330, expressly stated that a legally sufficient or *prima facie* showing [of probable cause] is not required.

Coley, 145 Md. App. at 521 (citation omitted); *see also State v. Johnson*, 208 Md. App. 573, 589 (2012) ("In order to satisfy the substantial basis test, the warrant application need not establish a legally sufficient or prima facie case").[2]

In contending there was not a substantial basis to support the issuing judge's determination that there was probable cause for a search warrant, appellant maintains that there was no nexus connecting the street level distribution outside Lewis' and Kennedy's residences on Harpers Farm Road to his residence located on Little Patuxent Parkway. As this Court recently stated, the "authoritative . . . case on nexus" is *Holmes v. State*, 368 Md. 506 (2002). *Joppy v. State*, 232 Md. App. 510, 523, *cert. denied*, 454 Md. 662 (2017). In *Holmes*, the appellant and another man were observed by police in "hand-to-hand" drug transactions on the street, that the observing officer reasonably concluded were indicative

[2] We note here the prosecutor's explanation of the substantial basis test at the motions hearing: "as I think Judge Moylan said, if an affiant needs a "C" to get a warrant signed in terms of a grade, once the Judge signs it, it only needs to be a "D" grade to pass a substantial basis test."

of drug sales. *Holmes*, 368 Md. at 519. The transactions occurred immediately after the appellant was observed going "in and out of his house." *Id*. Following the suspicious transactions, the appellant was found in possession of a quantity of money and marijuana. *Id*. Police then successfully obtained a warrant to search appellant's residence. *Id*. at 511. Upon the ensuing search, police recovered over $8,000 in cash, several plastic bags containing cocaine, one containing marijuana, other paraphernalia, two handguns, a flare signal pistol, and five shotgun shells. *Id*.

The appellant argued that there was no probable cause for the search. *Holmes*, 368 Md. at 511. The Court framed the ultimate issue as "one of nexus," meaning, "could a neutral magistrate – the issuing judge – reasonably infer from these observations that drugs and other evidence of controlled dangerous substance violations was likely to be found in petitioner's home?" *Id*. at 519. The Court reviewed *Mills v. State*, 278 Md. 262 (1976), and *State v. Ward*, 350 Md. 372 (1998), both of which involved the search of a house for weapons, rather than for drugs, but both of which concluded that a reasonable inference could be drawn from the particular facts of the cases that the weapons would be found in the appellants' homes. *Id*. at 520-21. The Court explained that it found the requisite nexus in those cases because,

> in terms of pure deductive reasoning: a particular kind of weapon was used in the crime; there was evidence linking the defendant to the crime; the weapon was of a kind likely to be kept, and not disposed of, by the defendant; when arrested shortly after the crime, the defendant was not in direct possession of the weapon; *ergo*, it was likely to be found in a place accessible to him – his home or car.

Holmes, 368 Md. at 521.

The Court noted that the "same kind of deductive approach," had been used by a number of courts "in finding a nexus between observed . . . drug transactions and the likelihood that drugs or other evidence of drug law violations may be found in the defendant's . . . home," the reasoning being that experience and logic would dictate that if a person were dealing drugs, and if the drugs were not found on the person, they would most likely be found in a place readily accessible to the person, i.e., the person's home. *Holmes*, 368 M*d*. at 521-22. In reaching its ultimate conclusion that probable cause existed, the Court held the following:

> Direct evidence that contraband exists in the home is not required for a search warrant; rather, probable cause may be inferred from the type of crime, the nature of the items sought, the opportunity for concealment, and reasonable inferences about where the defendant may hide the incriminating items. . . . "[O]bservations of illegal activity occurring away from the suspect's residence, can support a finding of probable cause to issue a search warrant for the residence, if there is a reasonable basis to infer from the nature of the illegal activity observed, that relevant evidence will be found in the residence."

Holmes, 368 Md. at 522 (citations and emphasis omitted); *see also State v. Johnson*, 208 Md. App. at 606 ("A finding of nexus does not depend upon some direct observation of suspicious behavior in or near the residence").

Moreover, as the Fourth Circuit has confirmed: "a sufficient nexus can exist between a defendant's criminal conduct and his residence even when the affidavit supporting the warrant "contains no factual assertions directly linking the items sought to the defendant's residence." *United States v. Grossman*, 400 F.3d 212, 217 (4th Cir. 2005) (citation omitted); *see also United States v. Broussard*, 80 F.3d 1025, 1034 (5th Cir. 1996) (nexus between crime and place to be searched "may be established . . . by direct

observation or through normal inferences as to where the articles sought would be located"), *cert. denied*, 519 U.S. 906 (1996); *United States v. Sleet*, 54 F.3d 303, 306 (7th Cir. 1995) ("[A] search warrant may issue 'even in the absence of "[d]irect evidence linking criminal objects to a particular site'") (citation omitted); *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) ("A 'reasonable nexus' does not require direct evidence that the items listed as the objects of the search are on the premises to be searched. The magistrate must 'only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit.'") (citation omitted).

Appellant acknowledges the holding of *Holmes*, *supra*, but maintains that this case is closer to *Agurs v. State*, 415 Md. 62 (2010). Although the significance of *Agurs* is primarily in its analysis of the good faith doctrine (*see Joppy*, 232 Md. App. at 523), in that case, two detectives from the Baltimore City Narcotics Unit applied for a search and seizure warrant for two residences, five vehicles, and four individuals. *Agurs*, 415 Md. at 68. One of the two residences sought to be searched in the warrant application was Agurs' residence, which law enforcement confirmed by consulting Motor Vehicle Administration records. *Id*. The affidavit in support of the search warrant then made numerous allegations with respect to narcotics dealing in the Edmondson Village and Cherry Hill areas of Baltimore City at around the pertinent time, including, but not limited to: (1) multiple confidential informants identified Agurs as an upper level distributors supplying crack cocaine; (2) two controlled purchases were made from a person identified as Andrew Lee Tillman; (3) police saw Tillman and Agurs meet briefly together in an auto detail shop; (4) Agurs was seen meeting with another unidentified individual for a brief period in a clothing

store and the unidentified man was seen leaving the store with a bulge in his pocket; (5) Agurs had an extensive criminal record; and, (6) Agurs possessed multiple homes and automobiles which were not commensurate with his salary as a Baltimore City public works employee. *Agurs*, 415 Md. at 70-72. The trial court granted Agurs' motion to suppress the evidence seized, reasoning that "there had been no substantial basis for the issuing judge to find probable cause to search Agurs' home and vehicles." *Id*. at 74 (footnote omitted). This Court and the Court of Appeals agreed with this particular assessment that there was no nexus to support the warrant. *Id*. at 75, 83; *accord Joppy*, 232 Md. App. at 523.[3]

Since *Agurs* was decided, this Court has continued to find, under *Holmes*, a sufficient nexus to support a search warrant. For example, in *Williams v. State*, 231 Md. App. 156 (2016), *cert. denied*, 452 Md. 47 (2017), an anonymous source stated to police that the source purchased heroin from the defendant, and two confidential informants additionally told police that they purchased heroin from the defendant "not at his house," but on a "back road" in Denton, Maryland. *Williams*, 231 Md. App. at 189. Despite the fact that there was no direct evidence linking the defendant's drug trade to his residence, we still found a nexus. We were persuaded by the Sergeant's statement in the warrant application "that he knew, through his training and experience, that drug dealers often do not sell directly from where they reside or where they keep their drug supplies to protect

[3] As noted, the remainder of the *Agurs*' opinion primarily concerned the good faith exception, and, as this Court has subsequently noted, the fractured nature of that opinion makes *Agurs* of "dubious utility." *Joppy*, 232 Md. App. at 523.

themselves from detection by the police, rival drug dealers, and customers." *Id*. We concluded that "there was information offered that [the defendant] used his home as a 'stash house' where he stored, but did not sell drugs." *Id*.

More recently, in *Joppy, supra,* the Federal Bureau of Investigation ("FBI") and the Montgomery County Police Department were involved in a joint investigation of illegal drug dealing in crack cocaine in the area surrounding the Bel Pre Square Apartments in Montgomery County and primarily involving the suspected kingpin, George Gee. *Joppy*, 232 Md. App. at 514. As part of the investigation, it was suspected that Joppy was one of Gee's operatives. *Id*. Accordingly, the police prepared several search warrants, including one for 3320 Teagarden Circle, Apartment 104, believed to be a residence associated with Joppy. *Id*. at 515, 522. Although the issue of nexus was not preserved, this Court explained the doctrine as follows:

> The appellant is being naïve when he focuses on the lack of evidence of low-level street sales at or near the residences of the three key operatives in this case. Such evidence is not to be expected. Once the criminal nature of the network itself is established, the nexus challenge is largely one of identifying the primary residences of the three key operatives (a particularly vexing problem when they do not assist the police by formally signing up for the ownership or rental of their primary residences).

Joppy, 232 Md. App. at 518-19 (concluding that, had the issue been preserved, there was a substantial basis for the magistrate to find that there was a nexus between the criminal activities delineated in the warrant and appellant's residence); *see also State v. Johnson, supra*, 208 Md. App. at 618 (reversing motion court's grant of a motion to suppress because the court misapplied the substantial basis test and because there was a "deductive inference that evidence would be found in [suspect's] home or automobiles").

Here, the affidavit provides that appellant, positively identified via photographs by three reliable confidential informants as "IKE," was selling heroin and crack cocaine in Columbia, Maryland, from June 2016 through and including December 2017. Police detectives also were informed that appellant sold narcotics with Lewis and Kennedy in and around the same area during the same time.

One informant knew where appellant lived and provided that information to detectives. A check of records from both the Maryland Motor Vehicle Administration and Baltimore Gas and Electric confirmed that appellant lived at 12231 Little Patuxent Parkway, Apartment I. Police surveillance in December 2017, also provided information that was consistent with appellant residing at that address.[4]

As part of their investigation, police used a covert surveillance camera to observe the distribution of suspected narcotics near the residences of both Lewis and Kennedy on Harpers Farm Road in Columbia. Appellant was observed entering and exiting both of these residences for short visits, and the affiants opined that their observations suggested that appellant was involved in the sale of narcotics and a conspiracy to distribute controlled dangerous substances.

In an attempt to corroborate appellant's involvement in the ongoing conspiracy, the police investigation culminated in December 2017 when Confidential Informant #17-022 ("CI #17-022") performed a controlled buy from appellant in the area near Lewis' and

[4] Acknowledging that the distance between the homes was not provided in the warrant, the State proffered, without objection at the motions hearing, that appellant's address on Little Patuxent Parkway was located approximately a mile away from the Harpers Farm Road addresses for Lewis and Kennedy.

Kennedy's residences on Harpers Farm Road. The affidavit indicates that, while under direct surveillance from police observers, CI #17-022 went to the indicated area with a predetermined sum of U.S. currency provided by police. CI #17-022 approached the "tot-lot" located near Lewis' and Kennedy's residences, where the police observers briefly lost visual contact with the informant. Although there is no indication that police observed a transaction, CI #17-022 returned to police shortly thereafter with a baggie containing suspected marijuana and crack cocaine. CI #17-022 positively identified appellant as the person who sold him the suspected narcotics. A detective viewing the police surveillance camera confirmed that appellant was in the area at the time of this narcotics transaction.

After confirming that appellant resided at 12231 Little Patuxent Parkway, Apartment I, on December 21, 2017, a K9 unit scanned the third floor of the apartment building. Of the four apartments on that floor, only the door leading to Apartment I resulted in a positive alert. A review of appellant's criminal history revealed that he had a number of prior arrests for narcotics related and other violent offenses. The affidavit also indicates that the two affiants, Detective Corporal Reid and Detective First Class Hartman, had extensive hours of training, knowledge and experience in narcotics investigation, and that it was "common for drug dealers to secrete contraband, proceeds of drug sales, and records of drug transactions in secure locations within their residences for ready access and to conceal them from law enforcement authorities[.]"

Based on the foregoing, we are persuaded this case is closer to *Holmes* than to *Agurs*. The tips from the reliable confidential informants were corroborated by police surveillance and the implementation of a controlled buy directly from appellant's person,

albeit not at his residence. That bit of corroboration alone clearly provided probable cause that appellant was involved in the distribution of narcotics. As this Court has stated, it would be as "'[i]f the informant had been nothing more than a robot or a trained ape, the directly observed 'controlled buy' – with the informant as a mere mechanical agent – would have been sufficient to establish probable cause.'" *State v. Jenkins*, 178 Md. App. 156, 179 (2008) (quoting *Hignut v. State*, 17 Md. App. 399, 415 (1973)); *see also Massachusetts v. Upton*, 466 U.S. at 731 (finding that "[t]he informant's veracity and the basis of his knowledge are still important but, where the tip is adequately corroborated, they are not elements indispensible [sic] to a finding of probable cause").

We conclude there is further support by the fact that a K9 scanned appellant's door and positively alerted. Although we acknowledge that the affidavit does not indicate what the positive alert was for, or whether the K9 was certified, we reiterate that our standard of review is the substantial basis test. That standard further requires us to consider the facts averred in the affidavit under the totality of the circumstances. Under those rubrics, the "positive alert" of appellant's front door was a factor that could be considered in the overall analysis. *See Fitzgerald v. State*, 153 Md. App. 601, 619 (2003) ("As we affirm the adequacy of the warrant application, we hold that Alex's 'alert' to Apartment A was *ipso facto* enough to establish probable cause"), *aff'd*, 384 Md. 484 (2004); *Cf. Florida v. Jardines*, 569 U.S. 1, 11-12 (2013) (concluding that dog alert after police brought a K9 to the front porch of a private home to perform a scan was an unreasonable search).

As his final argument to the warrant itself, appellant contends that the information therein was stale. This Court rejected a similar claim in *State v. Johnson*, *supra*:

> Our concern is not with probable cause, but only with the question of whether the warrant-issuing judge had a substantial basis for issuing the warrant. In a close case, the fact that the probable cause might be found by a reviewing court to be stale would not *ipso facto* necessitate a ruling that the warrant-issuing judge had lacked a substantial basis for issuing the warrant. Staleness is a highly subjective factual question that different judges could answer in different ways, and reviewing judges are required to be highly deferential to the warrant-issuing judge and to eschew *de novo* determinations of their own. Every defect in probable cause does not necessarily invalidate the substantial basis predicate and staleness, as but one of such possible defects, is no exception.

State v. Johnson, 208 Md. App. at 619.

Moreover, even assuming that a substantial basis did not exist for the finding of probable cause, we are persuaded that the good faith exception announced in *United States v. Leon*, 468 U.S. 897 (1984) is applicable. In *United States v. Leon*, the Supreme Court held that evidence seized under a warrant, subsequently determined to be invalid, may be admissible if the officers executing the warrant acted in objective good faith and with reasonable reliance on the warrant. *Leon*, 468 U.S. at 919-20. The *Leon* Court reasoned that because "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," the rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 916, 919; *see also Massachusetts v. Sheppard*, 468 U.S. 981, 989-90 (1984) (a police officer is not "required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested"). This Court has recently explained:

> The Good Faith Exception was a watershed. Read in their totality, *Leon* and *Sheppard* explain that the Fourth Amendment's fundamental protection consists of taking the decision to search or to seize out of the hands

> of the officer, engaged in the often competitive enterprise of ferreting out crime, and entrusting it to the neutral and detached judicial figure. That location of the decision-making authority in the judge, whenever possible, is the very function and purpose of the Fourth Amendment's warrant clause.

Joppy, 232 Md. App. at 539. *see also Leon*, 468 U.S. at 921 ("'[Once] the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.' Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.") (citation and footnote omitted).

There are exemptions from the good faith exception. As our Court of Appeals restated in *Patterson v. State*, 401 Md. 76 (2007), the Supreme Court outlined four situations when an officer's reliance on a search warrant would not be reasonable:

> (1) the magistrate was mislead [sic] by information in an affidavit that the officer knew was false or would have known was false except for the officer's reckless regard for the truth;
>
> (2) the magistrate wholly abandoned his detached and neutral judicial role;
>
> (3) the warrant was based on an affidavit that was so lacking in probable cause as to render official belief in its existence entirely unreasonable;
>
> (4) the warrant was so facially deficient, by failing to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonable [sic] presume it to be valid.

Patterson, 401 Md. at 104 (citing *Leon*, 468 U.S. at 923).

Appellant's challenge is under the third of these exemptions. Considered objectively, that test requires that:

> officers, exercising professional judgment, could have reasonably believed that the averments of their affidavit related to a present and continuing violation of law, not remote from the date of their affidavit, and that the

> evidence sought would be likely found at [the place identified in the affidavit]. The affidavit "cannot be so 'bare bones' in nature as to suggest that the issuing judge acted as a 'rubber stamp' in approving the application for the warrant."

Patterson, 401 Md. at 107 (citations omitted).

The Court explained:

> A "bare bones" affidavit is one that contains "wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause."

Patterson, 401 Md. at 107 (quoting *United States v. Laury*, 985 F.2d 1293, 1311 n.23 (5th Cir. 1993)).

The *Patterson* Court continued:

> A mistake in the probable cause determination is obvious if "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." A reasonably well-trained officer should know that a warrant cannot authorize an unreasonable search and that a search warrant issued on less than probable cause is illegal. Additionally, a reasonably well-trained officer must know that the affidavit he or she submits has to provide the magistrate with a substantial basis for determining the existence of probable cause.

Patterson, 401 Md. at 107 (citations omitted).

This was not a "bare bones" affidavit. The police investigation included information from three reliable confidential informants; covert surveillance, by both police officers and surveillance cameras; a controlled buy from appellant himself; and a positive K9 alert on appellant's front door. We are persuaded that, even if there was no substantial basis to support the warrant in this case, the police reasonably acted in good faith reliance on the warrant. Even were we to conclude that the evidence of nexus was deficient, as the Court of Appeals has explained in a similar case:

> [T]he police here made an effort to assemble *some*, if as assumed insufficient, evidence to provide a substantial basis from which the issuing judge could infer a finding of probable cause to search the residence based upon [the] affidavit. As such, we hold that the evidence seized from the residence may be moored in the safe harbor of the good faith exception to the Fourth Amendment's exclusionary rule because the warrant was not "so lacking in indicia of probable cause" as to render police reliance on the issuance of the warrant entirely unreasonable.

Marshall v. State, 415 Md. 399, 413 (2010) (upholding a search of a suspect's residence under the good faith doctrine).

JUDGMENT AFFIRMED.

COSTS TO BE ASSESSED TO APPELLANT.