

NOT DESIGNATED FOR PUBLICATION

No. 99,812

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOSE A. CIBRIAN,
Appellant.

MEMORANDUM OPINION

Appeal from Saline District Court; DAN D. BOYER, judge. Opinion filed
December 19, 2008. Reversed and remanded.

Meryl Carver-Allmond, of Kansas Appellate Defender Office, for appellant.

Ellen H. Mitchell, county attorney, and *Stephen N. Six*, attorney general, for
appellee.

Before CAPLINGER, P.J., ELLIOTT, J., and BUKATY, S.J.

Per Curiam: Jose A. Cibrian appeals his conviction of possession of

methamphetamine after a bench trial on stipulated facts. He claims the trial court should have suppressed evidence discovered incident to an illegal arrest. We reverse and remand for further proceedings.

Officer James Blackwell worked a residential burglary where musical instruments and electronics were stolen. Two or 3 days after the burglary, a pawn shop owner reported that Chad Garman had brought in a guitar subsequently identified as being stolen in the burglary.

Blackwell and other officers proceeded to the address given by Garman to the pawn shop. Garman told Blackwell he had received the guitar from two individuals named Sergio and Cibrian who had been staying at his house with him and his girlfriend.

Garman had made several attempts to sell the guitar so they could split the money. Garman allowed the officers to search his house; some of the stolen property was discovered.

Garman also told the officers that he and his girlfriend were to pick up Sergio and Cibrian at a specific address and take them to Wichita.

Blackwell and other officers proceeded to the address given; upon entering the

residence, Cibrian was handcuffed for suspicion of burglary. Cibrian was searched and his wallet contained a bag of methamphetamine. None of the stolen musical instruments or electronics from the burglary was found.

Cibrian's motion to suppress was denied; the trial court reasoned the recovery of some stolen property, coupled with Garman's statements implicating Cibrian and listing his whereabouts, provided probable cause to arrest Cibrian for felony possession of stolen property and burglary and to conduct a search incident to the arrest.

Under the essentially undisputed facts presented here, the question of whether to suppress is one of law over which we have unlimited review. See *State v. Fitzgerald*, 286 Kan. 1124, 1126, 192 P.3d 171 (2008).

The State bears the burden of proof to demonstrate the search that led to the discovery was lawful. *State v. Fewell*, 286 Kan. 370, Syl. ¶ 1, 184 P.3d 903 (2008). One of the exceptions permitting a warrantless search is a search incident to a lawful arrest. See *State v. Conn*, 278 Kan. 387, 390-91, 99 P.3d 1108 (2004). One question thus becomes whether the arrest of Cibrian was lawful.

K.S.A. 22-2501 provides that when a lawful arrest is effected, an officer may reasonably search the person arrested, to, among other things, discover the fruits or

evidence of a crime. And K.S.A. 22-2401(c)(1) permits an officer to arrest a person when the officer has probable cause to believe the person is committing or has committed a felony.

"Probable cause is the reasonable belief that a specific crime has been committed and that the defendant committed the crime. Because probable cause does not require evidence of every element of a crime, it must not be confused with proof beyond a reasonable doubt. For this reason, all the information in the officer's possession, fair inferences therefrom, and facts may be taken into consideration that might not be admissible on the issue of guilt."

"In dealing with probable cause, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. Probable cause exists where the facts and circumstances within the acting officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed." *Fewell*, 286 Kan. 370, Syl. ¶¶ 3, 4.

In *State v. Hendricks*, 31 Kan. App. 2d 138, 61 P.3d 722 (2003), the informant's brother's girlfriend advised police where to find the informant. After being apprehended, the informant became aware that his brother's girlfriend had turned him in, at which time, the informant reported that his brother and girlfriend had drugs and ran a prostitution ring

in their apartment.

Based on that information, officers obtained a search warrant, and the brother successfully sought to suppress evidence found in his apartment during the search.

On appeal, we held that where the informant was not a disinterested citizen and had an ulterior motive for providing false information, *further information was necessary* concerning the informant's veracity. Possible police corroboration of the information provided was unnecessary to establish probable cause for a search warrant. We concluded the magistrate lacked probable cause to issue the warrant. *Hendricks*, 31 Kan. App. 2d at 144.

In the present case, at the time he was arrested, the only evidence connecting Cibrian to the burglary were self-serving statements made by Garman and his girlfriend, both of whom had a strong motivation to lie, as they were discovered with a house full of stolen goods and Garman had pawned a stolen item earlier that day.

Cibrian, on the other hand, did not have any stolen goods in his possession but nonetheless was immediately arrested without any opportunity to provide an explanation.

The State argues the information provided by Garman was reasonably trustworthy

and also noted Garman used his own name and address when pawning the stolen guitar and that Garman voluntarily allowed police to search his residence.

State v. Landis, 37 Kan. App. 2d 409, 418-19, 156 P.3d 675, *rev. denied* 284 Kan. 949 (2007), provides further guidance for us. There, a person arrested for having marijuana in her car became an informant and told police she had just purchased the marijuana from defendant and provided them with the location of his residence.

Officers obtained a search warrant for the residence, and defendant was subsequently unsuccessful in seeking suppression of evidence obtained during that search.

On appeal, we ruled the search warrant was issued without probable cause, reasoning that in the absence of any other information concerning the informant's reliability, police corroboration of the location of defendant's residence was insufficient to establish the informant's credibility or reliability. 37 Kan. App. 2d at 419-20.

Likewise, in the present case, little evidence was presented concerning Garman's and his girlfriend's veracity and reliability, as they clearly had motivation to place blame on others. Garman was an admitted participant in the crime of trying to sell the stolen goods.

In essence, the only real evidence implicating Sergio and Cibrian were the hearsay statements of Garman and his girlfriend. Other than locating Sergio and Cibrian at the address given, officers did not testify to finding any corroborating evidence at the address given prior to placing Cibrian under arrest.

Here, as in *Hendricks* and *Landis*, the officers did not have enough information concerning veracity or credibility of Garman and his girlfriend—or corroborating evidence—to form a reasonable belief that Cibrian had committed the crimes of possession of stolen property or burglary. Without probable cause to support the arrest, the search incident to the arrest was unlawful and evidence obtained thereby should have been suppressed.

Cibrian's conviction for possession of methamphetamine must be reversed, and the case remanded for further proceedings.

