IN THE COURT OF APPEALS OF THE STATE OF ALASKA

HARRY JAMES MCNAMARA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12163 Trial Court No. 1CR-13-00107 CR SUMMARY DISPOSITION No. 0054 — July 24, 2019

Appeal from the Superior Court, First Judicial District, Craig, David V. George, Judge.

Appearances: Kelly R. Taylor, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Joannides and E. Smith, Senior Superior Court Judges.[*]

Harry James McNamara was convicted, following a jury trial, of fourth-degree misconduct involving a controlled substance (possession of more than twenty-five

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

cannabis plants).[1] On appeal, McNamara argues that the superior court erred when it denied his motion to suppress the evidence against him. For the reasons explained here, we find no merit to this claim.

Prior to trial, McNamara moved to suppress photographic evidence of cannabis plants on an iPod that had previously belonged to McNamara and had been turned over to the police. McNamara argued that the search warrant contained material misstatements related to the investigating officer's description of the various photographs that were found on the iPod.[2] The officer described the photographs to the magistrate judge but did not provide the actual images to the judge. According to McNamara, the officer misrepresented the number of cannabis plants in the photographs. McNamara also argued that the officer misrepresented the chronology in which the photographs were taken so as to make it appear that the photographs of the cannabis plants were the most recent photographs on the iPod.

Following an evidentiary hearing, the superior court denied McNamara's motion to suppress. The court found first that the officer had reasonably estimated that there were twenty-five cannabis plants in the photographs. (The court itself counted between twenty-four and twenty-six plants in the photographs.) The court also found that, even if the officer was mistaken about the exact number of cannabis plants, that mistake was not material to the probable cause finding because there was sufficient evidence presented to establish probable cause under AS 11.71.040(a)(2) (possession of

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[1] Former AS 11.71.040(a)(3)(G) (pre-2016 version).

[2] *See State v. Malkin*, 722 P.2d 943, 946 (Alaska 1986) (holding that a search warrant is invalid if the magistrate's finding of probable cause is based on material misstatements of fact (or material omissions of fact) that the police offered in reckless disregard of the truth); *Lewis v. State*, 862 P.2d 181, 186-87 (Alaska App. 1993) (interpreting *Malkin*).

more than one ounce of marijuana with intent to manufacture or deliver). Lastly, the court found that any mistake by the officer was at most negligent.

We have reviewed the photographs at issue. We agree with the superior court's conclusion that the officer's estimate of twenty-five plants was not unreasonable under the circumstances. Accordingly, we find no error in the superior court's ruling that McNamara had not met his burden of establishing that the officer made a false or misleading statement about the number of plants.

With regard to the allegedly false chronology, the superior court found that the officer did not claim to know when the photographs were taken or which photographs were taken first. Instead, the superior court viewed the officer as simply describing the photographs sequentially as they appeared on the iPod. Because the superior court found that the officer did not actually offer a chronology, the superior court found no merit to McNamara's claim that the officer had misrepresented the chronology of when the photographs were taken.

We have reviewed the search warrant application and the officer's testimony at the search warrant hearing. Although an argument could be made that the officer's description of the photographs suggested a chronology, we note that the officer himself was clear that he did not know when the photographs were taken. More importantly, the probable cause finding did not rest on any purported chronology.[3] As the superior court noted, the officer provided "strong information corroborating the theory that cannabis plants were currently in McNamara's trailer." This information included the officer's testimony that he smelled cannabis on McNamara's porch about a month before the search warrant application, and information from the same time frame provided by a confidential informant, who reported recently seeing marijuana plants in

[3] *See Lewis*, 862 P.2d at 186 (citing *Malkin*, 722 P.2d at 946).

McNamara's trailer and purchasing marijuana from him. Given all this, we find no error in the superior court's denial of this suppression claim.

The superior court's judgment is AFFIRMED.