

STATEMENT OF THE CASE

Defendant-Appellant John Harlow (“Harlow”) brings this interlocutory appeal from the trial court’s order granting the State’s motion to correct error and denying Harlow’s motion to suppress.

We reverse.

ISSUE

Harlow states the issues as:

1. “May a party request the presiding judge to rule on a motion to correct error several months after the omnibus date and after receiving two unfavorable rulings from a properly appointed magistrate when the Indiana Code requires such a request be made no later than ten days after the omnibus date?”
2. “Is the seizure of an individual’s trash unsupported by the requisite reasonable suspicion if predicated on two anonymous tips over the course of several weeks and non-specific police observation of vehicles coming and going from a residence?”

FACTS

The police received a tip from an anonymous informant that a person known as Harlow was dealing drugs from his residence. The informant told the police to watch the residence at 1229 S. Manhattan Avenue and draw their own conclusions. The police watched the residence for an undisclosed number of Thursday nights and Friday mornings between 10:00 p.m. and 7:00 a.m. and observed people going in and out of the house at all hours of the night and morning.

About ten weeks later the police received another anonymous tip from a second and unrelated citizen that the resident of 1229 S. Manhattan Ave. was dealing

methamphetamine as well as cooking methamphetamine at that residence. The second tipster said that the male resident at the residence cooks all the time, and he, the tipster, had seen ounces of methamphetamine in the home.

In late March, the police seized the trash at 1229 S. Manhattan Avenue without a warrant. (Since there were no hearings in this matter the foregoing facts were taken from the affidavit for probable cause.)

Harlow and his wife were charged with a number of offenses resulting from his arrest relating to methamphetamine dealings on March 31, 2005. Harlow moved to suppress the evidence obtained by the police from a warrantless trash pull. A duly appointed commissioner of the trial court held a hearing on this motion and granted it on November 15, 2005. On December 13, the State filed a motion to schedule a hearing on good faith, which was denied by the same commissioner on January 27, 2006. The State made no objections to the commissioner handling the case up to this point. On February 27, 2006, the State filed a motion to correct error and a motion to have the presiding judge rule on the motion to correct error. The presiding judge held a hearing on these motions on March 31, 2006, and reversed the previous rulings of the commissioner by granting the motion to correct error, and denying Harlow's motion to suppress. This interlocutory appeal follows.

DISCUSSION AND DECISION

Issue 1.

Indiana Code §33-33-49-32(c), which became effective on July 1, 2005, provides in applicable part:

“A party to a superior court proceeding that has been assigned to a magistrate¹ appointed under this section may request that an elected judge of the superior court preside over the proceeding instead of the magistrate to whom the proceeding has been assigned. A request under this subsection must be in writing and filed with the court... in a criminal case, not later than ten (10) days after the omnibus date. Upon a timely request made under this subsection by either party, the magistrate to whom the proceeding has been assigned shall transfer the proceeding back to the superior court judge.”

The omnibus date was May 2, 2005. Harlow contends that the State’s motion was untimely. We agree.

The State makes an argument about the retroactive application of the foregoing statute. However, the statute took effect on July 1, 2005, and the State made its motion to transfer proceedings on February 27, 2006, some eight months after the statute became effective. The statute was in full force and effect and retroactivity has no application under these facts. The State also argues that it only asked for a ruling on the motion to suppress and not for a motion to transfer the entire case. We need not determine whether the statute refers to “bits and pieces” of a case, or whether the entire case and all subsequent proceedings are to be transferred to the superior court judge. Regardless of which applies the time limit would be the same.

It was error for the presiding judge to assume jurisdiction pursuant to the State’s untimely motion.

Issue 2.

¹ The parties use the terms of commissioner and magistrate interchangeably.

Both the State and Harlow urge, under the umbrella of judicial economy, that we also decide whether or not the Commissioner correctly held that the evidence should be suppressed. Given the record before us we will attempt to resolve the issue insofar as it relates solely to Harlow's motion to suppress. Harlow's argument is based solely on Article I, Section 11 of the Indiana Constitution.

We review a trial court's ruling on a motion to suppress in a manner similar to claims challenging the sufficiency of the evidence. Coleman v. State, 847 N.E.2d 259, 261-2 (Ind. Ct. App. 2006). In reviewing a trial court's decision on a motion to suppress, we do not weigh the evidence or judge the credibility of witnesses, but determine if there was substantial evidence of probative value to support the trial court's ruling. Id. When evaluating determinations of reasonable suspicions, we accept the factual finding of the trial court unless they are clearly erroneous. Id. However, the ultimate determination of reasonable suspicion is reviewed *de novo*. Id.

In considering a warrantless trash pull the trash must be retrieved in substantially the same manner as the trash collector would use. Love v. State, 842 N.E.2d 420, 424 (Ind. Ct. App. 2006). (Citing Litchfield v. State, 824 N.E.2d 356, 357 (Ind. 2005)). Harlow concedes that point. Also, in order for the search of the trash to be permissible, the officer must possess a reasonable, articulable suspicion, i.e., the same as that required for a Terry stop of an automobile, for seizing the trash. Id.

In granting the motion to suppress, the Commissioner expressed concern that the affidavit for a search warrant did not specify the dates and times that the police observed Harlow's house after receiving the first anonymous tip. Anonymous tips are not

acceptable. Washington v. State, 740 N.E.2d 1241, 1246 (Ind. Ct. App. 2000). The anonymous informant made no claims concerning the suspects' alleged future conduct. The Commissioner further stated that the police saw people coming and going from Harlow's home, but that is not an illegal act. The affidavit did not identify Harlow as a meth seller or of cooking meth. Additionally it was observed that the second tip did not identify future criminal activities by Harlow and that there were no personal observations by the second informant.

The Commissioner correctly granted the motion to suppress.

CONCLUSION

The State failed to comply with the appropriate procedure to transfer the case from the commissioner to the presiding judge. The motion to suppress was correctly granted.

Judgment reversed.

NAJAM, J., and CRONE, J., concur.