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# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1997-CA-000335-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 92-CR-003275

JAMES E. WIMSETT, JR.; ET AL. — APPELLEES

AND NO. 1997-CA-000405-MR

JAMES E. WIMSETT, JR. — APPELLEE/CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 92-CR-003275

COMMONWEALTH OF KENTUCKY — APPELLANT/CROSS-APPELLEE

AND NO. 1997-CA-000406-MR

CHARLES STOVALL, JR. — CROSS-APPELLANT/APPELLEE

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE

ACTION NO. 92-CR-003275

COMMONWEALTH OF KENTUCKY CROSS-APPELLEE/APPELLANT

AND NO. 1997-CA-000407-MR

SHELLEY WILSON CROSS-APPELLANT/APPELLEE

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT CUORT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 92-CR-003275

COMMONWEALTH OF KENTUCKY APPELLANT/CROSS-APPELLEE

OPINION
REVERSING ON DIRECT APPEAL
AND AFFIRMING CROSS-APPEAL

* * * * * * * * * *

BEFORE: GARDNER, HUDDLESTON, and KNOX, JUDGES.

KNOX, JUDGE. This is an interlocutory appeal by the Commonwealth of Kentucky pursuant to KRS 22A.020(4) from an order of the Jefferson Circuit Court suppressing evidence seized in two searches conducted in conjunction with a widespread investigation into drug trafficking activity in the Jefferson County area. Appellees cross-appeal the denial of their motion to dismiss the indictments based upon improperly conducted grand jury proceedings. On the Commonwealth's direct appeal, we reverse; on the cross-appeal, we affirm.

On December 10, 1992, appellees Wimsett, Wilson, and Stovall, along with 12 others, were indicted for criminal syndication and a variety of drug-related offenses in conjunction

with a large-scale, long-term police investigation code named operation "Top Dog." In the course of the Top Dog grand jury proceedings, 22 grand jury subpoenas were issued for various telephone records. The telephone records were subsequently provided to lead detective Tim Royse. The grand jury never saw, and did not consider, the phone records prior to returning indictments in the case. However, the telephone records were examined by the police and used by Detective Royse in his affidavits in support of obtaining two search warrants, one to search the residence and business of Wimsett, and the other to search the residence of Wilson.

Following a variety of pretrial motions and hearings, on November 16, 1995, the appellees filed a motion to dismiss the indictments or, in the alternative, to suppress the telephone records. On January 11, 1996, the trial court entered an order denying the motion to dismiss, but granting the motion to suppress the telephone record evidence. The trial court held that the use of grand jury subpoenas to obtain pretrial discovery for the police was an abuse of process which required suppression of the telephone records. The Commonwealth did not appeal the ruling. See KRS 22A.020(4). The doctrine of res judicata prescribes that a fact or matter distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. Barnett v. Commonwealth, Ky., 348 S.W.2d 834, 835 (1961). The doctrine of res judicata is applicable to judgments in criminal prosecutions

and is subject to the same limitations as apply in civil cases. Commonwealth v. Spivey, Ky., 48 S.W.2d 1076 (1932); Ex parte Mote, Ky., 275 S.W.2d 48 (1955). For purposes of our review, the judgment of the trial court that the telephone records should be suppressed is res judicata.

On August 2, 1996, the appellees filed a motion seeking (1) dismissal of the case for prosecutorial misconduct before the grand jury relative to a defective deliberation and/or indictment; (2) dismissal of the case or suppression of a notebook documenting drug transactions due to its questionable provenance; (3) dismissal of the case or suppression of the fruits of the searches supported by warrants obtained through affidavits that relied, in part, on the suppressed telephone records.

On January 24, 1997, the trial court entered an order denying dismissal of the case, but granting the appellees' motion to suppress evidence seized in the two searches. The trial court, citing U.S. v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677, held that the search warrants were obtained in reliance on the improperly obtained phone records and that "the misuse of those records in regard to the method used to obtain same are [sic] sufficient to suppress the evidence seized at the two. . . locations." The Commonwealth appeals the suppression of evidence and the appellees cross-appeal the denial of their motion to dismiss the case.

The exclusionary rule reaches not only primary evidence

obtained as a direct result of an illegal search or seizure, Weeks v. U.S., 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." Nardone v. U.S., 308 U.S. 338, 341, 60 S. Ct. 266, 268, 84 L. Ed. 307 (1939). The exclusionary rule "extends as well to the indirect products" of unconstitutional conduct. Wong Sun v. U.S., 371 U.S. 471, 484, 83 S. Ct. 401, 416, 9 L. Ed. 2d 441 (1963); Segura v. U.S., 468 U.S. 796, 804, 468 S. Ct. 3380, 3385, 82 L. Ed. 599. However, "the exclusionary rule has no application [where] the Government learned of the evidence 'from an independent source.'" Segura, supra at 468 U.S. 805, 468 S. Ct. 3385 (citations omitted).

If officers illegally obtain evidence of criminal conduct and then use that information in an affidavit that causes a warrant to issue for a search or seizure, the ostensibly legal, warranted invasion of privacy falls under the exclusionary rule. U.S. v. Butts, 729 F.2d 1514 (8th Cir. 1984), citing Alderman v. U.S., 394 U.S. 165, 176-177, 89 S. Ct. 961, 968-969, 22 L. Ed. 2d 176 (1969). Evidence that is either the direct or indirect product of illegal police action must be suppressed as fruit of the poisonous tree. Churchwell v. Commonwealth, Ky. App., 843 S.W.2d 336 (1992), citing Wong Sun v. United States, 371 U.S. 471, 485, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441, 445 (1963). However, if other evidence obtained from an independent source is sufficient to support probable cause for the warrant, the evidence seized need not be suppressed. Segura, supra; 22A C.J.S.

Criminal Law § 785 (1989).

Based upon the foregoing authorities, if, exclusive of the information obtained from the phone records, Detective Royse's affidavit nevertheless established probable cause to justify the issuance of the search warrants, the fruits of the searches need not be suppressed. If, however, once the phone record information is stricken, there is not probable cause to justify the warrants, the evidence must be suppressed.

Probable cause for the issuance of a search warrant is a matter to be determined by a judge from a reading of the affidavit. Lindsay v. Commonwealth, Ky., 500 S.W.2d 786, 788 (1973). No warrant should issue until an independent determination of probable cause based upon a common-sense reading of the entire affidavit has been made. Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1964); Rooker v. Commonwealth, Ky., 508 S.W.2d 570, 571 (1974). The standard of review for the issuance of a search warrant requires reviewing courts to examine whether the issuing judge had a substantial basis for concluding that the affidavit in support of the warrant established probable cause. Illinois v.Gates, 462 U.S. 213, 238-239, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983); Beemer, 665 S.W.2d 912, 915 (1984); Commonwealth v. Smith, Ky. App., 898 S.W.2d 496, 504 (1995). After-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. Beemer, 665 S.W.2d at 914. A

magistrate's determination of probable cause should be paid great deference by reviewing courts." Id. As long as the issuing judge had a substantial basis for concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. Id. The issue of probable case is one of law and appellate courts may review the sufficiency of the information before the magistrate independent of the trial court's determination. Smith, supra.

Because of the factual differences in the Wimsett and Wilson searches, the two searches will be considered individually. The search warrant for Wimsett's home and business located at 8659 Stiles Road, Howardstown, Kentucky was obtained on December 11 and executed on December 14, 1992. The search warrant broadly identified items to be seized as any financial or drug records, items purchased with drug proceeds, monies derived from the sale of controlled substances, and any illegal items observed during the search. The December 11, 1992, probable cause affidavit of Detective Royce in support of the search warrant states, in pertinent part, as follows:[1]

> On the 13th day of June, 1991, at approximately 3:55 p.m., affiant received information from a confidential informant, who states he knows a subject by the name of Jay Wimsett who sold him marijuana from 1987-1989 on a daily basis. On June 15, 1992 (approximately), I received drug records from Officer John Turner of the Bardstown Police Department. These drug records were found in

[1]The underlined portions of the affidavit represent information relating to the improperly obtained phone records.

a vehicle that was driven and wrecked by Jay Wimsett. These records were later identified by several suspects as drug records belonging to Jay Wimsett. These records indicated telephone numbers, names, and monetary amounts. After receiving these records, further investigation was conducted and the affiant had interviews with several suspects on these lists, and statements have been obtained in which these suspects state they have observed Jay Wimsett keeping records of transactions in notebooks and that he would keep these records in his home, vehicles, and on his person. Witnesses state they have purchased marijuana between 1986 and 1992. Also, another confidential informant states that Jay Wimsett told him that he was going to build a safe in the Liquor Store to keep his marijuana in. This confidential informant also states that Jay's girlfriend, Kathy Wolf who also lives with Jay, is a cocaine user. Confidential informant #1 has proven his reliability by providing information that has led to the arrests of at least two (2) persons and the seizure of illegal drugs. Confidential informant #2 has proven his reliability by providing the affiant with information that has led to the seizure of illegal drugs and the on-going investigation of several suspects.

Acting on the information received, affiant conducted the following independent investigation: I have conducted a background investigation and no arrests have been found on Jay Wimsett, however he has received several citations in 1992. During an interview with one of the suspects, he stated that Jay had told him he wrecked his truck and left the scene and that the police had gotten his notebook. In another interview with another suspect, he stated that he had observed Jay with a notebook that he kept on his person. During the course of this investigation, I have discovered drug records on many of the suspects that I have questioned and also records in their possession. I have obtained phone tolls which indicate this subject had made and received hundreds of calls from known drug

> dealers. The last records received show contact into late October 1992. I have observed during my hundreds of investigations that drug dealers keep drug related and financial records on their persons, in their vehicles, in their homes and businesses. Both the Liquor Store and the residence above it belonging to Jay Wimsett.

Generally, probable cause exists if, at the time of the search, the totality of the circumstances would lead a reasonable person to believe that contraband, instrumentalities, or evidence of crime is probably present at the time and place of the search. See Illinois v. Gates, supra; Commonwealth v. Walker, Ky., 729 S.W.2d 440 (1987). The information contained in the affidavit related to the Wimsett search refers to drug-related activities extending from the years 1986 to 1992. The affidavit refers to certain "drug records" obtained from Wimsett's vehicle which were used to record drug transactions. The affidavit reflects that an investigation was conducted which resulted in interviews with suspects observing Wimsett record drug transactions. While the information contained in the affidavit is not specific as to time, the affidavit does portray a pattern of drug activity extending up until approximately six (6) months prior to the execution of it. In reviewing the affidavit, and in applying the totality of the circumstances rule adopted by our highest Court in Walker, we believe that, exclusive of that portion of the affidavit which refers to the illegally seized phone records, the affidavit states sufficient probable cause to support the issuance of a search warrant. Hence, we reverse the trial

court's suppression of the fruits of the search of the Wimsett residence.

The search of the Wilson property, located at 1112 Fischer Avenue, Louisville, Kentucky, occurred on November 12, 1992, and was pursuant to Royse's affidavit of the same date. The search warrant specified items to be seized as marijuana and cocaine along with any other illegal controlled substances; any devices used to cut, weigh, package or use marijuana, cocaine, or other illegal drugs; any items showing residency or occupancy of 113 Fischer Ave.; and any illegal items observed during the legal scope of the search. The affidavit stated in pertinent part as follows:[2]

> On the 15th day of June (Approx), 1992, at approximately 10:00 a.m. affiant received information from Off. John Turner, Bardstown P.D. who provided affiant with information & drug records relating to a large scale marijuana operation in Jefferson and Nelson Counties. Through the use of Grand Jury Subpoenas was obtained the names of these drug dealers and their addresses. Also monetary amounts were noted on these records. In addition numerous phone calls from toll records have shown a pattern of calls from marijuana dealers in Nelson Co., from 1988 to present. I have also received information from officer Mike Newton of the Nelson County Police Department who states he has observed this subjects vehicle at one of the known drug dealers businesses.
>
> Acting on the information received, affiant

[2]The underlined portions of the affidavit represent information relating to the improperly obtained phone records. For clarity, slight textual changes, relating to abbreviations and punctuation, have been made.

> conducted the following independent investigation. A background check was conducted on this subject and no arrests were found. A drivers license check was conducted [and] shows she lives at 1112 Fischer. Subscriber information shows an address of 1112 Fischer. Surveillance has been conducted on this residence on numerous occasions and vehicles have been observed going to residence, stay a short while then leave. When subject was stopped and asked for her driver's license, I observed what appeared to be a pack of rolling papers. After subject was brought to office and detectives were questioning her, she stated she used marijuana and when asked if she was dealing, she stated nothing you would be interested in.

This affidavit, exclusive of the phone record information, establishes probable cause to justify the issuance of a warrant to search the Wilson residence. Four factors, in particular, identified in the affidavit support this conclusion (1) Wilson admitted that she used marijuana; (2) Wilson was in current possession of rolling papers; (3) vehicle traffic patterns at Wilson's home were consistent with drug trafficking; and (4) Wilson's statement -- "nothing you would be interested in" -- when asked if she was dealing, may reasonably be construed as an admission to dealing, but in an amount insufficient to interest Detective Royse.

In doubtful or marginal cases, a search pursuant to a warrant will be sustained where otherwise it might fall. United States v. Ventresca, 380 U.S. 102 (1965), 85 S. Ct. 741, 13 L. Ed. 684. Under the totality of the circumstances, see Illinois v. Gates, supra, exclusive of the phone record information, there

was probable cause to justify the search warrant. Hence we reverse the trial court's suppression of the fruits of the Wilson search.

In their cross-appeal, appellees allege that the trial court erred in refusing to dismiss the case for improprieties before the grand jury. The alleged impropriety relates to a missing page of the grand jury indictment. The grand jury transcripts reflect that the proposed indictment distributed to the grand jurors was missing a page and that when this was pointed out to the Commonwealth, Assistant Commonwealth's Attorney Keith Kamenish responded:

> Okay. What we can do, uh, we can make her an extra copy. We'll just have to put 'em together when we conclude. Is that satisfactory with you, or we can just whip through this. While you're deliberating' I'll go out and run off about 15 copies and we'll just slide them in each Indictment because I know everyone's getting a little tired here, okay. Does anyone have a problem with that?

The appellees argue that this evidences either (1) that Mr. Kamenish entered the grand jury room during grand jury deliberations to distribute the missing page, which would violate RCr 5.18, see Vaughn v. Commonwealth, Ky., 485 S.W.2d 497 (1972); or (2) the missing sheet was not distributed and, consequently the grand jury returned an incomplete indictment. The appellees argue that under either scenario, the indictment was defective and should be dismissed. The trial court refused to dismiss the indictment, holding that "[t]here appears to be no substantial

proof in regard to what occurred in the Grand Jury room[.]"

The cross-appeal brought by the appellees is an interlocutory appeal brought by defendants to a criminal action and hence unreviewable by this Court. While KRS 22A.020(4) permits the Commonwealth to appeal an adverse interlocutory order, there is no similar right granted to a criminal defendant. Evans v. Commonwealth, Ky., 645 S.W.2d 346 (1982); Eaton v. Commonwealth, Ky., 562 S.W.2d 637 (1978). Hence we affirm the decision of the trial court.

For the foregoing reasons, the order of Jefferson Circuit Court is affirmed in part and reversed in part.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

A. B. Chandler III
Attorney General

BRIEF FOR APPELLEES/CROSS-APPELLANTS:

John H. Harralson, III
Louisville, Kentucky

Laura L. New
Assistant Attorney General
Frankfort, Kentucky

E. H. Tingle
Louisville, Kentucky

Michael C. Lemke
Louisville, Kentucky