RENDERED: October 19, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002457-MR

TROY TOOLEY — APPELLANT

v.

APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 99-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Troy Tooley has appealed from a judgment and final sentencing of the McLean Circuit Court entered on October 4, 1999, following the entry of a conditional guilty plea by Tooley to the offenses of manufacturing methamphetamine[1], trafficking in methamphetamine[2], possession of drug paraphernalia

[1]Kentucky Revised Statute 218A.1432.

[2]KRS 218A.1435.

while in the possession of a firearm,[3] possession of methamphetamine while in the possession of a firearm[4] and possession of a police receiver[5]. Tooley preserved for appeal the issue of whether the trial court erred by refusing to find that his co-defendant Alan W. Humphrey's[6] residence had been subjected to an unconstitutional search pursuant to an invalid search warrant. Tooley was arrested during the search of Humphrey's residence and the McLean County Sheriff's Department later searched his residence and seized several items that he argues should also be suppressed. Having concluded that the trial court's findings of fact were supported by substantial evidence and that the trial court did not erroneously apply the law, we affirm.

On March 8, 1999, at approximately 6:30 p.m., McLean County Deputy Sheriff Terry Wetzel, at the request of McLean County Deputy Sheriff Kenny Thomasson,[7] was providing extra patrol for the area surrounding Humphrey's residence due to complaints from unnamed persons that unusual odors had been coming from Humphrey's premises and that an abnormal amount of traffic had been seen coming in and out of the area of Humphrey's

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[3]KRS 218A.500 and KRS 218A.992.

[4]KRS 218A.1415 and KRS 218A.992.

[5]KRS 432.570.

[6]Humphrey's conviction was affirmed in a separate opinion in case no. 1999-CA-002410-MR rendered this date.

[7]Deputy Thomasson was serving as acting Sheriff at that time.

residence. As Deputy Wetzel patrolled the area, he noticed a strong smell of either starting fluid or ether coming from Humphrey's house or garage. Deputy Wetzel reported this observation to Deputy Thomasson and the two of them agreed to meet and patrol the area together. The two deputies went back to Humphrey's residence and slowly drove past, once again noticing a strong smell of ether. Through their narcotics training, they had learned that ether was often used in the manufacturing of methamphetamine. The police officers also observed several vehicles in and about Humphrey's property and they noticed that light was coming out from beneath the garage door.

Based upon this information, the police officers contacted McLean County Attorney William Quisenberry for the purpose of obtaining a search warrant for Humphrey's house and garage. The police officers met with Attorney Quisenberry at approximately 8:20 p.m. on March 8, and Deputy Wetzel signed an affidavit in support of the search warrant. Thereafter, Trial Commissioner John Hicks arrived at the courthouse and signed a search warrant for Humphrey's property. Deputy Wetzel and Deputy Thomasson then left to execute the search, but while they were en route to Humphrey's property they were contacted by cellular phone by Attorney Quisenberry and asked to return to the courthouse so Deputy Wetzel could sign a supplemental affidavit in support of a new search warrant. After the new search warrant was issued, Deputy Wetzel and Deputy Thomasson left again to execute the search.

Several police officers arrived at the scene to search Humphrey's house and garage. Deputy Thomasson went with the team that searched the garage. The police officers seized both methamphetamine and items used to make the drug. The police officers also arrested Tooley and took him to the McLean County jail. While in the jail, Tooley was overheard having a conversation with his wife by jail personnel which led them to believe that drug-related evidence could be found at his residence. The information was passed on to the police. The police went to the Tooley residence and Tooley's wife consented to a warrantless search of their residence. Methamphetamine and drug-related supplies were found at Tooley's home.

Tooley was indicted and on August 23, 1999, he entered a conditional plea of guilty in the McLean Circuit Court to the offenses of manufacturing methamphetamine, trafficking in methamphetamine, possession of drug paraphernalia while in the possession of a firearm, possession of methamphetamine while in the possession of a firearm and possession of a police receiver.[8] This appeal followed.

Tooley's arguments as set out in his brief are somewhat convoluted. We believe the proper sequential analysis of the issues on appeal is to first determine whether the affidavits in support of the search warrant for Humphrey's residence were

[8]On October 4, 1999, the trial court sentenced Tooley to prison for terms of 12 years, ten years, five years, five years and 12 months, respectively, for each of the above convictions. The sentences all ran concurrently with each other.

facially deficient; and then to determine whether critical allegations in the affidavits were false. If the affidavits were facially deficient, reversal would be required; and it would not matter if the critical allegations were false.[9] If the affidavits were facially sufficient, then the truthfulness of the critical allegations would have to be considered.[10] If the critical allegations were false, then reversal would be required; and it would be impossible for the search to be deemed otherwise valid under the "good faith" exception of Crayton, supra.[11] Finally, since we have held the search of Humphrey's residence to be constitutional, Tooley's argument that the evidence seized as his residence was the result of the invalid search at Humphrey's residence and is therefore barred by the "fruit of the poisonous tree" doctrine, is without merit.

We will first address the question of whether the affidavits were facially deficient. "[T]he object of an affidavit for a search warrant is not to charge all of the elements or prerequisites of a given offense. It is intended merely to supply written evidence of facts which are such that a reasonably discreet and prudent person would have probable cause for believing that an offense has been committed and evidence

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[9]Crayton v. Commonwealth, Ky., 846 S.W.2d 684, 688 (1992).

[10]Commonwealth v. Smith, Ky.App., 898 S.W.2d 496, 503 (1995).

[11]Crayton at 687-88. ("If the affidavit contains false or misleading information, the officer's reliance cannot be reasonable.")

material to a prosecution of the offense might be obtained under the search."[12]

Section 10 of the Kentucky Constitution provides in part that "no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." This Court held in Coker v. Commonwealth,[13] that "[t]his section has long been held to require that the affidavit for a search warrant reasonably describe the property or premises to be searched and state sufficient facts to establish probable cause for the search of the property or premises."[14]

The "plain smell" or "plain odor" doctrine as a reasonable means to establish probable cause has long been recognized in Kentucky.[15] In Cooper v. Commonwealth,[16] where probable cause was established when an officer stopped a suspect on the highway and smelled marijuana emanating from the suspect's car, this Court stated:

> It is a fundamental principle that a policeman may "observe" with any of his five senses for purposes of a misdemeanor arrest. As long ago as 1925, this state's highest court held that a warrantless search could be based upon smelling illegal liquor. The federal courts have also recognized a "plain

[12]Commonwealth v. Melvin, Ky., 256 S.W.2d 513, 514 (1953).

[13]Ky.App., 811 S.W.2d 8 (1991).

[14]Id. at 9.

[15]Commonwealth v. Johnson, 206 Ky. 701, 268 S.W. 345 (1925).

[16]Ky.App., 577 S.W.2d 34 (1979).

> smell" analogue to the "plain view" doctrine. Therefore, when Trooper Arnold approached the car and smelled marijuana smoke, he had probable cause to believe that a misdemeanor was being committed in his presence by Cooper, and the arrest without a warrant was proper [citations omitted].[17]

While there is no Kentucky case which directly addresses the "plain smell" doctrine with regards to the manufacturing of methamphetamine, we believe this situation is analogous to the establishment of probable cause based upon the smell of marijuana.[18] Certainly, the processing of both drugs emanates a unique odor that is easily detectible by police officers who have been properly trained. We believe that based upon the strong smell of ether, the police officers' observations of an unusual amount of traffic and their training related to the manufacturing of methamphetamine, the trial commissioner had probable cause to issue the search warrant for Humphrey's house and garage. Thus, on the face of the affidavits there was probable cause to issue the search warrant.

Tooley's only remaining means of attacking the validity of the search of Humphrey's residence is to establish that crucial allegations in the affidavits were false. If the affidavits would have been insufficient to establish probable

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[17]Id. at 36.

[18]Although Kentucky has not directly addressed this issue other courts have held that the odor of chemicals associated with creating methamphetamine is sufficient to establish probable cause. People v. James, 62 Cal.App.4th 244, 74 Cal.Rptr.2d 7 (1998); United States v. Echegoyen, 799 F.2d 1271 (9th Cir. 1986).

cause that evidence of a crime would be found at Humphrey's residence without relying upon crucial statements provided in the affidavits that were false, then the trial court would have erred by refusing to suppress the evidence that was seized during the search.[19] In Smith, supra, this Court stated:

> To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause. The same basic standard also applies when affidavits omit material facts. An affidavit will be vitiated only if the defendant can show that the police omitted facts with the intent to make, or in reckless disregard of whether the omission made, the affidavit misleading and that the affidavit, as supplemented by the omitted information, would not have been sufficient to support a finding of probable cause.[20]

Tooley argues that the search warrant for Humphrey's residence was invalid because the police officers provided false statements in the supporting affidavits which were relied upon by the trial commissioner for his finding probable cause that evidence of a crime would be found at the residence. The affidavits show that the primary basis for Deputy Wetzel's and

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[19]Humphrey needlessly argues that if the police officers made false, misleading and inaccurate statements to obtain the search warrant, the "good faith" exception to the exclusionary rule could not save the otherwise improper search. The "good faith" exception will allow evidence to be used following an improperly issued search warrant if "it appears that the affidavit was made in good faith but the warrant erroneously issued by virtue of judicial error[.]" Crayton, supra at 688.

[20]Smith, supra at 503 (citing United States v. Sherrell, 979 F.2d 1315, 1318 (8th Cir. 1992); and State v. Garrison, 118 Wash.2d 870, 872-873, 827 P.2d 1388, 1390 (1992)).

Deputy Thomasson's belief that illegal drug activity either had recently occurred or was occurring at Humphrey's residence was the apparent smell of ether that was detected by both police officers; the fact that they had recently been provided with information that there had been an unusual amount of traffic entering and exiting Humphrey's residence; and their narcotics training concerning ether constituting evidence of the manufacturing of methamphetamine.

Before the trial court, Tooley identified three specific statements by the police officers in the affidavits that he believed to be false. The trial court summarized these allegations as follows:

> (1) Affiant claimed that the nearest neighbor house or building was over 100 yards away, yet testimony at the suppression hearing revealed that there was a neighbor's house on the opposite side of the road in front of the Humphrey's property within 100 feet of the Humphrey's residence.
>
> (2) Affiant claimed the wind was blowing from the house to the road but that the evidence at the suppression hearing was contradictory to that claim.
>
> (3) Affiant claimed that officer Darrell Stewart had personally observed a suspected drug dealer at the Humphrey residence on several occasions, but the testimony from officer Stewart at the suppression hearing was that he never saw a suspected drug dealer at the residence.

In its opinion denying Tooley's motion to suppress, the trial court rejected each of these allegations. It found that the statements in the affidavits were neither false or misleading:

First, the neighbor's house which was approximately 100 feet from the Humphrey residence was across the highway and in the opposite direction from the way the wind was blowing on March 8, 1999. In other words, as the officer observed the smell of ether, and given the direction that the wind was blowing, there was no way the odor could be coming from the opposite side of the highway. There was no neighbor house within 100 yards of the Humphrey residence and in the direction that the wind was blowing. Taken in context, the officer's statement in the affidavit was accurate.

8. Second, all of the pertinent evidence at the suppression hearing as to the direction in which the wind was blowing supports the statement in the affidavit. Defense witness, Edward Goode, stated that the general direction the wind was blowing on March 8, 1999, at the hour in question, was exactly as testified to by Deputies Wetzel and Thomasson.

9. Third, the statement in the affidavit of Deputy Wetzel that officer Stewart had advised Deputy Thomasson that Stewart had personally observed a suspected drug dealer at the Humphrey residence on several occasions is supported by the evidence. Officer Stewart testified that he advised Deputy Thomasson that he had seen a known dealer on at least two occasions either stopped in front of the Humphrey residence or had either just backed out of the driveway or was going to turn into the driveway. Officer Stewart went on to testify that this person may not be a dealer but actually was suspected to be "involved in methamphetamine in some way". While technically there may be a difference between a "dealer" and someone "involved in methamphetamine in some way", this is a difference without a distinction in terms of providing accurate information to obtain a search warrant. While President Clinton might appreciate the parsing of these words by the Defendants in their argument, this Court must conclude that all in all, the testimony from all the officers on this point was very consistent and supportive of the statements in the affidavit.

For Tooley to prevail on his claim that crucial statements in the affidavits were false, we would have to conclude that the trial court's findings of fact were not supported by substantial evidence. RCr[21] 9.78 provides in regard to a suppression hearing that "[i]f supported by substantial evidence the factual findings of the trial court shall be conclusive."[22] Substantial evidence is evidence of sufficient probative value to induce conviction in the minds of reasonable persons.[23] We have reviewed the transcript of the suppression hearing and the testimony provided therein certainly constitutes substantial evidence to support each of the trial court's findings of fact. The trial court did not err in denying the motion to suppress.

Tooley's final claim, that the items seized at his residence should be suppressed based upon the fruit of the poisonous tree doctrine, is without merit since we have held that the search of Humphrey's residence was valid. Because the search of Humphrey's residence was valid, and subsequent arrest of Tooley was valid, the poisonous tree doctrine is not applicable to the case sub judice.[24]

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[21]Kentucky Rules of Criminal Procedure.

[22]See Diehl v. Commonwealth, Ky., 673 S.W.2d 711, 712 (1984).

[23]Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

[24]The evidence at the suppression hearing was that while in jail, Tooley was overheard by jail personnel telling his wife to (continued...)

For these reasons, the judgment of the McLean Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dan Jackson
Hartford, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

David A. Smith
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[24](...continued)
hide a safe. This information that led police to believe there was evidence of drug activity at the Tooley residence. Police officers then went to the Tooley residence and were given permission by Mrs. Tooley to search the residence. Tooley has not argued that the officers lacked probable cause to search his residence based upon this conversation. Likewise, he has not argued that his wife lacked authority to consent to the search.