

RENDERED: MARCH 23, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000132-MR

VICTOR R. SHELBY

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEVE MERSHON, JUDGE
ACTION NOS. 04-CR-000189; 04-CR-003352;
AND 05-CR-002762

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Victor R. Shelby brings this appeal from a November 29, 2005,
judgment of the Jefferson Circuit Court upon a conditional guilty plea to the offenses of

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

tampering with physical evidence and possession of drug paraphernalia. We vacate and remand.

In December 2003, Shelby was on parole from a life sentence. According to Parole Officer Carole Stiles' testimony,² she received a community complaint upon Shelby from the Louisville Metro Police on December 4. Officer Stiles testified that the Metro Police informed her that a controlled drug purchase had been made from Shelby's residence in Louisville.

Later that evening, Officer Stiles and the Metro Police went to Shelby's residence. Officer Stiles knocked on the door and announced their presence. Shelby did not immediately open the door; rather, Officer Stiles testified that Shelby said "Who is it?", "I'll be there in a minute," and "Just a minute." After five to ten minutes, Shelby opened the door. Officer Stiles and officers of the Metro Police then entered the residence. Officer Stiles testified that Shelby told her that he needed to go to work and started searching for his car keys in the oven, microwave, and kitchen sink. The kitchen sink was filled with water and dishes. While Shelby was searching for his car keys, Officer Stiles stated that she heard something drop in the sink. Thereupon, Officer Stiles drained the sink of its water and uncovered an electronic scale and crack cocaine. Upon a further search of Shelby's residence, the police recovered a crack pipe and \$1,877.00 in cash. Crack cocaine was later seized from Shelby's person at the jail.

Shelby was subsequently indicted by a Jefferson County Grand Jury upon trafficking in a controlled substance (Kentucky Revised Statutes (KRS) 218A.1412),

² Parole Officer Carole Stiles testified at a suppression hearing on April 30, 2004, in the instant action.

tampering with physical evidence (KRS 524.100), and possession of drug paraphernalia (KRS 218A.500). Shelby filed a motion to suppress evidence seized from the search of his residence and person. Shelby argued that the search violated his rights under the Fourth Amendment of the Kentucky Constitution and Fourteenth Amendment of the United States Constitution. A short suppression hearing was held on April 30, 2004. By order entered August 24, 2004, the court denied Shelby's motion to suppress.

By various motions, Shelby thereafter sought to discover the identity of the confidential informant and facts surrounding the controlled buy from his residence. The Commonwealth objected and argued that such information was privileged from disclosure. By order entered August 30, 2005, the circuit court ordered the Commonwealth to disclose who the confidential informant purchased drugs from on December 4, 2003. This was to be accomplished by indicating the seller's name or as detailed a description of the seller as possible. Also, the Commonwealth was ordered to disclose whether the informant wore a wire at the time of the controlled buy. The court did not order the identity of the informant to be disclosed by the Commonwealth. The record reflects that the Commonwealth never supplied the information as ordered.

Instead, at a pretrial hearing on October 4, 2005, the Commonwealth admitted that there was no confidential informant and that a controlled buy never took place. The Commonwealth stated that a Louisville Metro police officer indicated that a "telephone call" was received that "may" have mentioned Shelby.

Also on October 4, 2005, Shelby entered a conditional guilty plea to tampering with physical evidence and possession of drug paraphernalia, reserving his

right to appeal the denial of his suppression motion. Ky. R. Crim. P. (RCr) 8.09. On October 5, 2005, the court entered a judgment on the conditional guilty plea. The court sentenced Shelby to five years' imprisonment by order entered November 29, 2005.³

This appeal follows.

Shelby contends the circuit court erred by denying his motion to suppress evidence seized from the search of his residence and his person. Upon review of the circuit court's decision to deny a motion to suppress the evidence, the court's findings of fact are deemed conclusive if supported by substantial evidence of a probative value; however, issues of law are reviewed *de novo*. RCr 9.78; *Diehl v. Commonwealth*, 673 S.W.2d 711 (Ky. 1984). Our review shall proceed accordingly.

At the time of the search, Shelby was on parole. As a condition of parole, Shelby agreed that he "I may be subject to search and seizure if my officer has reason to believe I may have illegal drugs, alcohol, volatile substances or other contraband on my person or property." When a parolee/probationer is subject to such a search condition, an officer may conduct a search if that officer possesses "reasonable suspicion" that the parolee/probationer is engaged in criminal conduct. *U.S. v. Knights*, 534 U.S. 112 (2001).

In concluding that reasonable suspicion existed to justify the search of Shelby's residence, the circuit court specifically found:

First of all, the police had an informant's tip alleging narcotics trafficking at Mr. Shelby's residence. Secondly, although Mr. Shelby acknowledged the officer's presence, he

³ Victor R. Shelby's five-year sentence was ordered to run concurrently with sentences in Action Nos. 04-CR-3352 and 05-CR-2762, and to run concurrently with a life sentence he was serving.

did not open the door for a considerable period of time. Then, to say the least, he exhibited unusual behavior by insisting that he was late for work but searching for his car keys in an oven, a microwave and a kitchen sink which was full of water and dirty dishes.

While it may have been better practice for the probation officers to have secured a search warrant, they clearly had reasonable suspicion that Mr. Shelby was either violating the conditions of his supervision or engaging in illegal activity. Because of this, the Defendant's motion to suppress will be denied.

Undoubtedly, the confidential informant's tip was crucial to the court's conclusion that reasonable suspicion existed. The court's order was entered on August 24, 2004, and it was not until October 4, 2005, that the Commonwealth finally admitted that no such confidential informant existed.

At the suppression hearing, Officer Stiles specifically testified that she was told by the Louisville Metro Police that a controlled buy was conducted at Shelby's residence. Thereafter, in several motions, the Commonwealth resisted disclosing information surrounding the confidential informant and argued that the informant's identity was privileged. The Commonwealth was finally ordered by the circuit court to disclose facts surrounding the controlled buy. It was not until some eighteen months after the suppression hearing that the Commonwealth admitted that the confidential informant did not exist and that a controlled buy never occurred.

The true facts leading to the filing of the community complaint by the Metro Police are unknown. In this Court's view, the community complaint and the facts supporting it are pivotal to a determination of reasonable suspicion. Additionally, the

admission of materially false information by the Commonwealth at the suppression hearing pervasively tainted the proceeding. As such, we are of the opinion that the circuit court should conduct another suppression hearing where the facts surrounding the community complaint are fully disclosed.

Upon remand, we direct the circuit court to hold a suppression hearing and to reconsider Shelby's motion to suppress.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is vacated and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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