

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-001672-MR  
AND  
NO. 2005-CA-001686-MR

JAMES RANDEL SALLEE AND  
TERESA WADDELL

APPELLANTS

v. APPEALS FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 05-CR-00038 & 05-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,<sup>1</sup> SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Teresa Waddell appeals from a judgment of conviction entered by the Muhlenberg Circuit Court on July 29, 2005. The trial court sentenced Waddell to serve two and half years in prison after a jury convicted her of possession of a controlled substance in the first degree, possession of drug paraphernalia, and possession

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<sup>1</sup> 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 KRS 21.580.

of marijuana. On appeal, Waddell argues that the trial court prejudiced her by consolidating her case with the case against James Randel Sallee; argues that the evidence presented by the Commonwealth was insufficient to sustain her conviction; and argues that the trial court erred when it denied her motion to suppress the evidence garnered from the execution of a search warrant. Finding no merit to any of Waddell's claims, we affirm her conviction.

Waddell's co-defendant, James Randel Sallee, also appeals from a judgment of conviction entered by the Muhlenberg Circuit Court. The trial court sentenced Sallee to serve twelve years in prison after a jury convicted him of possession of controlled substance in the first degree, subsequent offense, and possession of drug paraphernalia, subsequent offense. Furthermore, after the guilt phase of the trial, Sallee pleaded guilty to being a persistent felony offender in the second degree. On appeal, Sallee also argues that the trial court erred when it denied his motion to suppress the evidence garnered from the execution of a search warrant. As with Waddell's appeal, we find no merit to Sallee's arguments and affirm his conviction.

## **FACTS**

According to the record, the events which ultimately led to these appeals began on the night of December 21, 2004 when, at approximately 10:30 p.m., Detective Kenneth Wayne Perkins of the Kentucky State Police received a cell phone call from James Martir, a confidential informant. According to Detective Perkins's later testimony, during the phone conversation, Martir told the detective that he and another individual

entered Waddell's house, and, while there, he had observed the individual purchase a gram of methamphetamine. Based on this information, Detective Perkins drafted an affidavit to obtain a search warrant for Waddell's residence. The pertinent part of the affidavit read:

That at approximately 10:30 p.m. on December 21, 2004, the Affiant did have a telephone conversation with the a [sic] confidential informant at which time the confidential informant informed Affiant that on December 22, 2004, he (confidential informant) along with a male subject entered the hereinafter described premises. The confidential informant observed the male subject purchase one (1) gram of methamphetamine from a female subject known to the confidential informant as Terrie Lott, 503 North Second Street, Central City, Kentucky. That the confidential informant informed the Affiant that the substance that the male subject purchased was methamphetamine.

Based on this affidavit, Detective Perkins obtained a search warrant for Waddell's home, and he and his partner, Detective Jermaine Savage, executed the warrant on December 22, 2004. Upon executing the warrant, the detectives found Waddell, her roommates, Sallee and William Ricks, and three other individuals in the house. The detectives allowed the three other individuals to leave. Detective Savage spoke with Waddell, reading her the search warrant and informing her of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2D 694 (1966). After being informed of her rights, Waddell told the detective that there might be either marijuana or methamphetamine in a filing cabinet in her bedroom. Detective Savage searched Waddell's bedroom and found, in the filing cabinet, a security box that contained marijuana, methamphetamine and drug paraphernalia. The detective also found over

\$1,000.00 in cash in the cabinet and found more drug paraphernalia in an adjacent computer desk. The detective discovered, in Waddell's bedroom, a woman's jacket. Inside this jacket, he found a syringe that contained a white substance. In addition, the detective spoke with Sallee, and he admitted that he had drugs in his bedroom. Detective Savage searched Sallee's bedroom and found two bags of methamphetamine and drug paraphernalia. The detectives arrested Waddell, Sallee and William Ricks.

On February 11, 2005, Sallee was indicted and charged with possession of a controlled substance in the first degree, second or subsequent offense; possession of drug paraphernalia, second or subsequent offense; and as a persistent felony offender in the first degree, which was later amended to persistent felony offender in the second degree. On the same day, Waddell was indicted and charged with possession of a controlled substance in the first degree, possession of a controlled substance in second degree, possession of a controlled substance in the third degree, possession of drug paraphernalia and possession of marijuana. The second and third degree possession charges were later dismissed. Ricks was also charged with drug offenses, but he pleaded guilty.

Waddell and Sallee decided to proceed to trial, and, in March of 2005, over the defendants' objection, the trial court ordered the defendants' cases consolidated. In May of 2005, the defendants filed motions to suppress the fruits of the search. The defendants argued that the affidavit stated that the confidential informant witnessed a drug purchase on December 22<sup>nd</sup>, yet the informant told Detective Perkins about this purchase on December 21<sup>st</sup>. According to the defendants, this was a physical

impossibility which rendered the affidavit and the subsequent search warrant defective, requiring suppression. They also argued that the affidavit lacked probable cause since the detective failed to independently investigate Martir's tip. On May 16, 2005, the trial court held an evidentiary hearing regarding the defendants' suppression motions. At the hearing, the Commonwealth called only one witness, Detective Perkins. The detective testified to the facts previously mentioned and also explained that the December 22<sup>nd</sup> date found in the affidavit was merely a typographical error. Detective Perkins further testified about the confidential informant, Martir. According to the detective, Martir had participated in approximately 30 to 40 previous controlled drug buys under the detective's supervision. Given Martir's experience as a confidential informant, Detective Perkins testified that Martir was very knowledgeable about methamphetamine, and, since they had worked closely together, the detective opined that Martir had always been very reliable.

After hearing the detective's testimony, the trial court found that the affidavit contained a typographical error regarding the date of the drug transaction and concluded that Detective Perkins had adequately explained away the error. The trial court also found that, under the totality of the circumstances, the affidavit provided a substantial basis to support a finding of probable cause and denied the defendants' motions to suppress.

At the time of the first suppression hearing, the Commonwealth refused to reveal the identity of the confidential informant, James Martir. However, prior to trial,

the Commonwealth informed the defendants that the confidential informant was Martir and gave notice of its intention to call him as a witness. While preparing for trial, the prosecutor interviewed Martir. During this interview, Martir claimed that he had never been inside Waddell's home, and he insisted that he never observed a drug transaction there. After the interview, the Commonwealth informed the defendants about Martir's latest claims.

The trial court held another hearing on June 16, 2005. At the hearing, the defendants moved to suppress the fruits of the search, arguing that Detective Perkins included fabricated statements in the affidavit. Detective Perkins testified and reiterated his previous testimony. He also testified that on the morning of December 22<sup>nd</sup>, he, Detective Savage and Martir drove to Waddell's neighborhood and that Martir pointed out Waddell's house. According to the detective, Martir told both detectives that, on the night of December 21<sup>st</sup>, he had observed a drug transaction take place in Waddell's house, and he told the detectives that Waddell had placed surveillance cameras in and around her home.

Detective Savage testified that on the night of December 21<sup>st</sup>, his partner, Detective Perkins, had called him and had told him about Martir's phone conversation. Detective Savage stated that he accompanied Detective Perkins to obtain the search warrant and that, on the morning of December 22<sup>nd</sup>, he accompanied Detective Perkins and Martir to Waddell's neighborhood. According to Detective Savage, Martir reiterated

that he had observed a drug transaction, and he told the detectives about the surveillance cameras at Waddell's house.

After Detective Savage testified, the Commonwealth called James Martir to the stand. Martir testified that he began working as a confidential informant to secure dismissal of some drug charges. According to Martir, after he had participated in two or three drug transactions, he had completed his obligation to the police, but he continued to work as a paid confidential informant. Martir testified that, on the morning of December 21<sup>st</sup>, not on the 22<sup>nd</sup>, he had accompanied Detectives Perkins and Savage to Waddell's neighborhood and had told them about Waddell's surveillance cameras. Martir alleged that, on that morning, he told Detective Perkins that Waddell would not allow him in her house, but he claimed he told the detectives that he knew David Tabb and Waddell would allow Tabb in her home. Martir testified that, on the evening of December 21<sup>st</sup>, he called Detective Perkins and told him that he and Tabb went to Waddell's home but Waddell would not allow him in but did allow Tabb inside and that Tabb never left Waddell's home. Martir testified that he had never been inside Waddell's house and had never observed a drug transaction there; furthermore, he insisted that he never told Detective Perkins that he did. Martir also testified that his brother, Daniel O'Bannon, had called and told Martir that Sallee had contacted O'Bannon and requested that O'Bannon tell Martir to call Sallee regarding money. Martir insinuated that Sallee had attempted to bribe him. The Commonwealth then called O'Bannon to the stand, but O'Bannon denied

that Sallee had ever contacted him, and O'Bannon testified that he and Martir never had such a conversation.

After the second hearing, the trial court issued, on June 16, 2005, the following findings of fact and conclusions of law:

Detective Perkins was told by his confidential informant, James Martir, on December 21, 2004, that he (Martir) and a male subject did enter the residence of Defendant, Teresa Waddell, and that he (Martir) did observe a male subject purchase one gram of methamphetamine from a female subject known to Martir as Terrie Lott. James Martir on the next day repeated this information to both Detective Perkins and Detective Savage and did so while in the process of pointing out said residence which is now known to be the residence of Defendant, Teresa Waddell.

Whether that information given to the Detectives was true and correct and informant Martir is now fabricating his testimony at the hearing cannot be determined. The information given to Detectives could have been made up or it could have been truthful. The Detectives, especially Detective Perkins, believed what Martir said was true and they had a basis in which to depend on his credibility.

This Court's prior ruling dated May 19, 2005, denying the motions of the Defendants to suppress evidence remains unchanged. The good faith exception to the exclusionary rule found in *United States v. Leon*, 468 U.S. 897 (1984) still controls. The affidavit in the case at bar does not contain false or misleading information in that what Detective Perkins stated was told to him is in fact a true statement. There is not a knowing or reckless falsity in the affidavit signed by Detective Perkins and he did act in good faith in obtaining a search warrant. Accordingly, the renewed motions of the Defendants to suppress evidence are all DENIED and OVERRULED.

T.R. at 101-102. After the trial court denied the defendants' motions, they proceeded to trial and, as previously stated, were convicted. Now, both Waddell and Sallee appeal to this Court seeking relief.

### **WADDELL'S APPEAL**

To support her first argument, Waddell claims that, during the execution of the search warrant, Sallee admitted to Detective Savage that he had drugs in his bedroom. Waddell insists that the trial court, by consolidating the defendants' cases, prejudiced her since Sallee's admission, which was introduced at trial, weakened her defense. Citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2D 177 (2004), Waddell argues that Sallee's admission to Detective Savage was testimonial in nature and was inadmissible against her since she had no opportunity to cross-examine Sallee since he failed to testify at trial. In addition, she argues that Detective Savage's testimony regarding Sallee's admission was neither relevant nor competent evidence against her and was highly prejudicial to her. According to Waddell, the evidence against Sallee was much stronger than the evidence against her, so the combination of the strong evidence against Sallee and his admission bolstered the weak case against her and inflamed the jury against her. Therefore, Waddell concludes she was prejudiced.

According to Kentucky Rules of Criminal Procedure (RCr) 9.12, a trial court has the authority to order two or more indictments to be joined together for trial if the offenses and the defendants could have been joined together in one indictment. According to RCr 6.20, "two . . . or more defendants may be charged in the same

indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.” RCr 9.12 notwithstanding, a defendant may be granted a separate trial “[i]f it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder . . . of defendants.” In addition, the trial court possesses broad discretion regarding joinder, and we will not disturb its decision absent an abuse of discretion. *Berry v. Commonwealth*, 84 S.W.3d 82, 87 (Ky.App. 2001).

As the Commonwealth pointed out in its brief, Sallee's admission did not implicate Waddell. In fact, Sallee's admission to Detective Savage did not mention Waddell at all; therefore, the holding in *Crawford v. Washington, supra* simply does not apply to this case. While Waddell may claim that the evidence against her was weak, such a claim is not supported by the record and is not sufficient to show that she was prejudiced when the trial court consolidated the cases. The record demonstrates that the indictment against Waddell and the indictment against Sallee both arose from the execution of the search warrant; thus, the trial court did not abuse its discretion when it consolidated the cases.

In her second argument, Waddell avers that William Ricks pleaded guilty to drug offenses that arose from the search of her house, and she argues that he took responsibility for the drugs and drug paraphernalia found in her bedroom although she admits that he did not take responsibility for the drugs found in the woman's jacket that had been found in her bedroom. According to Waddell, the woman's jacket and the drugs

in it belonged to David Tabb. She also insists that Detective Savage's testimony was inconsistent and lacked credibility. Thus, the evidence, Waddell contends, was insufficient to support her conviction.

*Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991) is one of the leading cases addressing directed verdicts in criminal cases. According to *Benham*, when a trial court considers a motion for directed verdict, it must draw from the evidence all fair and reasonable inferences in favor of the Commonwealth. *Id.* at 187. Furthermore, a trial court is prohibited from granting a directed verdict if the evidence is sufficient to persuade a reasonable juror to believe that the defendant is guilty beyond a reasonable doubt. *Id.* In addition, the trial court must accept the Commonwealth's evidence as true; however, it must reserve questions of credibility and weight for the jury. *Id.* When we review the trial court's decision, we must determine, given the totality of the evidence, whether it would be clearly unreasonable for a jury to find guilt. *Id.*

Since the detectives did not find either drugs or paraphernalia upon Waddell's person at the time they executed the search warrant, the Commonwealth would have to rely upon the theory of constructive possession to convict Waddell of the possession charges. Constructive possession may be established if the the contraband in question was subject to the accused's dominion and control. *Clay v. Commonwealth*, 867 S.W.2d 200, 202 (Ky.App. 1993). In her brief, Waddell contends that the drugs found in her bedroom by the detectives belonged to either William Ricks or David Tabb. However, we point out that the jury was not required to believe either of these

contentions. *See Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671 (Ky. 1926). In addition, at trial, Waddell did not deny that she owned the house that the detectives had searched and did not deny that they found marijuana, methamphetamine and drug paraphernalia in her bedroom. Furthermore, during the execution of the search warrant, Waddell admitted to Detective Savage that drugs, specifically marijuana and methamphetamine, might be found in her bedroom inside the filing cabinet. Given these facts, there was ample evidence from which a reasonable juror could conclude that the drugs and paraphernalia found in Waddell's bedroom were in her control. So, given the totality of the evidence, the trial court properly denied Waddell's motions for directed verdict.

In her final argument, Waddell revisits the suppression issue. According to Waddell, the affidavit in support of the search warrant did not meet the “totality of the circumstances” test set forth in *Illinois v. Gates*, 462 U.S. 213, 238-239, 240, 103 S. Ct. 2317, 76 L. Ed. 2D 527 (1983), since Detective Perkins knowingly or recklessly included false statements in the affidavit. Thus, she concludes the search warrant was invalid.

When we review suppression issues, we first review whether the trial court's findings of fact were supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). If the trial court's findings are supported by substantial evidence, then we will deem those findings conclusive. RCr 9.78. Second, we review, *de novo*, whether the trial court correctly applied the law to the facts. *Commonwealth v. Neal, supra*.

After the second suppression hearing, the trial court made a finding of fact that Martir told the detectives that he witnessed a drug transaction in Waddell's home on the night of December 21, 2004. The trial court stated that the truth of this statement was indeterminable, but it found that, despite this, Detective Perkins had reason to believe Martir's statement. These findings were based upon and supported by Detective Perkins's testimony and Detective Savage's testimony. We recognize that Martir's testimony contradicts the detectives; however, the trial court was acting as the fact-finder and had the best opportunity to judge the credibility of the witnesses. See Kentucky Rules of Civil Procedure (CR) 52.01. The trial court decided that the detectives were credible and Martir was not. We will not disturb this decision and will not substitute our judgment regarding the credibility of the witnesses for that of the trial court. CR 52.01. So, we must abide by the trial court's findings of fact since Detective Perkins's testimony and Detective Savage's testimony constituted substantial evidence which supported the trial court's findings. Thus, we are left to determine if the trial court properly applied the law to its findings of fact. The trial court recognized that Martir's statement to the detectives may have been fabricated but concluded that the good faith exception to the exclusionary rule set forth in *U.S. v. Leon, supra* applied. We agree with the trial court that good faith exception applied and that the search warrant was valid.

In the alternative, Waddell contends that Detective Perkins made reckless misrepresentation regarding Martir's credibility and did nothing to corroborate Martir's

information. Citing *Beemer v. Commonwealth*, 665 S.W.2d 912 (Ky. 1984), Waddell reasons that the search warrant was not supported by probable cause.

At the first suppression hearing Detective Perkins testified that he found Martir to be credible. We find nothing in the record to suggest that this was a reckless misrepresentation. At the second suppression hearing, the detective testified that he had accompanied Detective Savage and Martir to Waddell's neighborhood and, at that time, Martir indicated which house belonged to her. While this action may not have constituted a great deal of independent investigation, it, along with the detailed information found in the affidavit, was sufficient given the totality of the circumstance to support a finding of probable cause. *See Illinois v. Gates, supra*. The trial court's finding that the affidavit was sufficient to support a finding of probable cause was supported by substantial evidence, and it correctly applied the law to the facts.

#### **SALLEE'S APPEAL**

According to Sallee, the information contained in the affidavit was not sufficient to demonstrate probable cause since Detective Perkins failed to do any independent investigation to corroborate Martir's story. In the alternative, Sallee argues that Detective Perkins included false information in the affidavit. Sallee acknowledges the good faith exception to the exclusionary rule set forth in *U.S. v. Leon, supra*, but argues that if an affidavit to obtain a search warrant contains false information, then the police who execute the subsequent warrant could not have reasonably relied on it. *Crayton v. Commonwealth*, 846 S.W.2d 684, 687-688 (Ky. 1992). Since, according to

Sallee, Detective Perkins knowingly included false information in the affidavit, he argues the good faith exception does not apply.

For the reasons previously stated, we find that the search warrant was valid.

### **CONCLUSION**

The judgment of conviction against Teresa Waddell and the judgment of conviction against James Randel Sallee are affirmed.

ALL CONCUR.

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