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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000025-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 06-CR-00174

VIRGIL WILSON, SR. — APPELLEE

OPINION REVERSING
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON AND HOWARD[1], JUDGES; GUIDUGLI,[2] SENIOR JUDGE.

HOWARD, JUDGE: The Commonwealth of Kentucky appeals from the Bell Circuit Court's November 21, 2006, order granting the motion of Virgil Wilson, Sr. (hereinafter Wilson), to suppress evidence obtained during a search of Wilson's residence. The circuit court found that the search warrant was improperly issued, due to a lack of

[1] Judge James I. Howard completed this opinion prior to the expiration of his appointed term of office on December 6, 2007. Release of the opinion was delayed by administrative handling.

[2] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

probable cause, because nine days had elapsed between an informant's statement to law enforcement personnel, upon which the search warrant was based, and the issuance of the search warrant. For the reasons stated herein, we reverse the order of the Bell Circuit Court and remand this matter for further proceedings.

On December 19, 2005, Kentucky State Police Trooper Brian Green initiated a traffic stop on a motor vehicle operated by Michael T. Emmett (hereinafter Emmett), after observing Emmett turn off of a highway without signaling. As soon as Trooper Green approached Emmett's vehicle, Emmett exited his vehicle and locked its doors. Trooper Green noticed a strong odor of marijuana on Emmett's person and conducted a pat down search of Emmett for weapons. During this pat down search, Trooper Green felt a marijuana cigarette in one of Emmett's pockets. Trooper Green asked Emmett to pull the marijuana cigarette out of his pocket. Emmett emptied the contents of his pocket, but tried to hide the marijuana cigarette in his hand. After further questioning from Trooper Green concerning the item in his hand, Emmett tried unsuccessfully to ingest the marijuana cigarette. At this point, Trooper Green arrested Emmett and transported him to a detention center.

After arresting Emmett, Trooper Green asked him where he obtained the marijuana. Emmett advised Trooper Green that he had just purchased it for five dollars at appellee Wilson's residence in Wells Camp, from an individual known as Jason Wilson. Emmett stated that when he bought the marijuana cigarette, he stood in the doorway of the house while it was retrieved. Trooper Green then inquired as to whether Emmett had

ever purchased any other drugs from the Wilson residence. Emmett answered that he had purchased a forty milligram oxycontin tablet from the appellee, Virgil Wilson, the day before, on December 18, 2005. Emmett described the location of Wilson's residence in detail and further advised Trooper Green that the drugs were kept inside the residence in a steel box by a chair.

After receiving this information, Trooper Green did not take any action immediately, but nine days later, on December 28, 2005, submitted an affidavit for a search warrant to search Wilson's residence to Bell District Judge Robert Costanzo. Trooper Green's affidavit supporting the search warrant stated:

> On 12/19, 2005, at approximately 1930 p.m., Affiant received information from/observed: Mike P. Emmett was stopped on Winchester Avenue for obstructed vision or windshield and failure to signal on the afternoon of December 19, 2005, at approximately 1415 hours. Mr. Emmett immediately exited the vehicle and the affiant approached Mr. Emmett immediately smelling a strong odor of marijuana originating from his person. Mr. Emmett appeared to be under the influence. Affiant then administered field sobriety test (HGN) and after administering test Mr. Emmett appeared to have something in his hand. He then turned from the affiant and attempted to orally ingest what was believed to be a marijuana cigarette. Affiant stopped Mr. Emmett from ingesting the contraband and took control of it. Mr. Emmett was then placed under arrest. As a result of the actions of Mr. Emmett further field sobriety tests were given at the Bell County Detention Center and Mr. Emmett was charged with operating a motor vehicle under the influence second offense, operating on DUI suspended license, possession of marijuana, obstructed vision/windshield, failure to signal, no seat belt, license plate not legible and no insurance. When asked by the affiant where the said drugs had been purchased, Mr. Emmett volunteered that on that afternoon 19 December 2005 just

> prior to the traffic stop he had purchased a marijuana Cigarette from Jason Wilson at a residence in Wells Camp: directions to said residence being described in paragraph 2. Furthermore Mr. Emmett stated that he had purchased the drug for five dollars. Mr. Emmett stated he stood at the door while Jason Wilson retrieved the drug. Mr. Emmett also volunteered that on 18 December 2005 he had purchased a Oxycontin pill 40 mg from Virgil Wilson. He then stated that Virgil Wilson had retrieved said drug from a steel box located inside of the residence next to a chair.
>
> Acting on the information received, Affiant conducted the following independent investigation:
>
> Affiant went to the location in police cruiser and located said residence as described by Mr. Emmett in Wells Camp where aforementioned transaction was executed.

Judge Costanzo found probable cause and issued a search warrant for the Wilson residence on December 28, 2005. Trooper Green executed the search warrant the same day. During the search of Wilson's residence, Trooper Green seized $7,641.00 in cash, one police scanner, 100 suspected hydrocodone tablets, 8 suspected oxycontin tablets, approximately 36.9 ounces of marijuana, 10 long guns, 5 handguns and approximately 30 packs of suspected stolen cigarettes.

The Bell County Grand Jury subsequently returned an indictment charging Wilson with first-degree trafficking in a controlled substance; second-degree trafficking in a controlled substance; trafficking in marijuana, eight or more ounces; and possession of a radio that sends and receives police messages. Following the indictment, Wilson moved the Bell Circuit Court to suppress all evidence obtained pursuant to the search warrant. In support of his motion to suppress, Wilson argued that the affidavit used to

obtain the search warrant was improper because it was not sworn before a magistrate and that the affidavit, and therefore the warrant, were based on unreliable information from Emmett. The affidavit was signed by Trooper Green but was not notarized. During the suppression hearing, Trooper Green testified that Judge Costanzo placed him under oath prior to issuing the search warrant. Judge Costanzo confirmed Trooper Green's testimony by stating that he never issued a search warrant without first administering an oath to the presenting officer. Trooper Green also testified that during the nine days between receiving the information and obtaining the search warrant, he conducted surveillance on the Wilson residence and observed an abnormal number of people coming and going from the house.

By an order entered November 21, 2006, the Bell Circuit Court found that Trooper Green was properly sworn by Judge Costanzo. However, the circuit court found that the warrant was improperly issued because it was not based upon probable cause, considering the totality of the circumstances. Specifically, the court held that,

> The reliability of Emmett's statement to Trooper Green diminished with the passage of nine days and the follow-up investigation added nothing. Probable cause might have existed for a search on the date of Emmett's arrest, but it did not exist nine days later.

As such, the circuit court granted Wilson's motion to suppress all evidence seized pursuant to the search warrant. This appeal by the Commonwealth followed.

On appeal, the Commonwealth argues that the Bell Circuit Court erred when it determined that probable cause did not exist for the issuance of the search

warrant. In support of this argument, the Commonwealth asserts that Emmett's statements to Trooper Green constituted reliable information to support probable cause and that the passage of nine days between the date of Emmett's arrest and the issuance of the warrant did not dissipate that probable cause.

Our analysis must begin by determining whether the search warrant was properly sworn, in compliance with the Kentucky Rules of Criminal Procedure. As noted above, the affidavit in this case was signed by Trooper Green, but was not notarized. RCr 13.10 provides that a search warrant may be issued by a judge "[u]pon affidavit . . . sworn to before an officer authorized to administer oaths . . ." A district judge is clearly permitted to administer an oath under Kentucky law. RCr 2.02; RCr 13.10.

Kentucky courts have repeatedly held that no search warrant shall be issued unless supported by an affidavit alleging probable cause. *Beemer v. Commonwealth,* 665 S.W.2d 912, 914 (Ky. 1984); *Embry v. Commonwealth,* 492 S.W.2d 929, 932 (Ky. 1973); *Guth v. Commonwealth,* 29 S.W.3d 809 (Ky. App. 2000). Furthermore, both Section 10 of the Kentucky Constitution and the Fourth Amendment to the United States Constitution require that probable cause be supported by "oath or affirmation." An oath or affirmation is a subscription to the truth of the statement made. To make a valid oath or affirmation, there must be some overt act which shows that there was an intention to take an oath or affirmation on the one hand and the intention to administer it on the other; mere intention, not accompanied by an unambiguous act, is insufficient. *Carrier v. Commonwealth*, 142 S.W.3d 670, 673-74 (Ky. 2004). In order to have a valid statement

under oath, the attention of the person to be sworn must be called to the fact that his or her statement is not a mere assertion, but must be sworn to, and he or she must do some corporal act in recognition of this. *Id*.

An affidavit is a written statement of fact under oath, sworn to or affirmed by the person making it before some person who has authority under the law to administer oaths, and certified by the officer under his or her seal of office. *Id.* An affidavit signifies the taking of an oath as to the truth of its contents. *Board of Elections v. Board Of Education,* 635 S.W.2d 324, 327 (Ky.App. 1982).

As the circuit court noted, the affidavit form used by Trooper Green, AOC-335, contains a signature line for a notary public, in the event the affidavit is not sworn before a judge. It does not specifically contain a line for the judge to sign, if he administers the oath, although we note that in practice judges frequently use the notary line to verify that the affidavit has been sworn. In this case, no second signature, that of the judge or a notary, was present on the affidavit form. However, the circuit court found District Judge Costanzo's testimony, concerning his practice to orally administer an oath in all cases involving the issuance of search warrants and Trooper Green's testimony that Judge Costanzo administered an oath to him prior to issuing this search warrant, to be persuasive. This is a finding of fact, which is "conclusive" if it is supported by substantial evidence. RCr 9.78; *Adcock v. Commonwealth,* 967 S.W.2d 6, 8 (Ky.1998). This finding was supported by substantial evidence, the testimony of both Judge Costanzo and Trooper Green. Therefore, we affirm the finding of the circuit court that Trooper

Green was properly sworn prior to the issuance of the search warrant, even though the administration of that oath was not noted in writing on the affidavit form. We suggest that it would be better practice to assure that the affidavit form is signed by either the District Judge or a notary, verifying that the oath was given.

Next, we must consider whether the search warrant issued with respect to the Wilson residence was based on probable cause. “Our review of a search warrant must give great deference to the warrant-issuing judge's findings of probable cause and should not be reversed unless arbitrarily exercised.” *Moore v. Commonwealth,* 159 S.W.3d 325, 329 (Ky.2005). In determining whether there is probable cause, the issuing judge (in this case, the district judge) must “make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Lovett v. Commonwealth,* 103 S.W.3d 72, 77 (Ky.2003) (quoting *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)).

Similarly, when reviewing a trial court's (in this case, the circuit court's) findings of fact after a suppression hearing, those findings shall be conclusive if supported by substantial evidence. RCr 9.78; *Adcock v. Commonwealth, supra.* If the findings are supported by substantial evidence, then the trial judge's application of the law to the facts is reviewed *de novo. Id.; see also Commonwealth v. Neal,* 84 S.W.3d 920, 923 (Ky.App. 2002).

As to the sufficiency of the substance of Trooper Green's affidavit, the first issue is that the affidavit in this case did not contain any affirmation by Trooper Green as to Emmett's reliability as a witness. However, the Kentucky Supreme Court in *Lovett v. Commonwealth, supra,* stated that in that case, "the affidavit upon which the finding of probable cause was based did not describe the informant's reliability, veracity, and basis of knowledge," *Id.* 103 S.W.3d at 77, and nonetheless upheld a finding of probable cause, stating,

> In *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the United States Supreme Court abandoned the rigid two-pronged test established by its previous holdings in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and adopted a "totality of the circumstances" approach for determining whether an informant's tip provided probable cause for the issuance of a search warrant. 462 U .S. at 230-31, 103 S.Ct. at 2328. Under this test, the issuing magistrate need only "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238, 103 S.Ct. at 2332. While an informant's veracity, reliability, and basis of knowledge are all "relevant considerations in the totality of the circumstances analysis," they are not conclusive and "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233, 103 S.Ct. at 2329.

*Id. 1*03 S.W.3d at 77-78.

Here, the affidavit did state the basis of Emmett's knowledge, that he had personally purchased specific illegal substances, marijuana and Oxycontin, from the

Wilson residence, on two successive days, and described where the drugs were located in the residence. The district court found this to be sufficiently persuasive as to Emmett's reliability, implicit in its finding of probable cause. "[A] magistrate's determination of probable cause is entitled to 'great deference' and should be upheld so long as the magistrate, considering the totality of the circumstances, had a 'substantial basis for concluding that a search would uncover evidence of wrongdoing.'" *Lovett,* 103 S.W.3d at 78 (citation omitted.) Furthermore, while the affidavit failed to specifically affirm Emmett's credibility as an informant, an affidavit for a search warrant based on information furnished by a *named* individual is ordinarily sufficient to support a warrant, without such affirmation. *Embry v. Commonwealth,* 492 S.W.2d 929, 932 (1973).

The final issue before us is whether or not the information obtained from Emmett became stale in the nine days before the search warrant was obtained. The Bell Circuit Court suppressed the evidence in this case on this basis, as set out above. In *Hause v. Commonwealth*, 83 S.W.3d 1 (Ky. App. 2001), this Court adopted the test from *United States v. Spikes*, 158 F.3d 913 (6th Cir. 1998) to determine if the information supplied in a search warrant affidavit is stale:

> "Instead of measuring staleness solely by counting the days on a calendar, courts must also concern themselves with the following variables: 'the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of

convenience or secure operational base?)[.]'"

Hause, 83 S.W.3d at 13, *quoting Spikes,* 158 F.3d at 923.

Analyzing the facts of this matter under the *Hause* test, we believe that the first factor has been established; that is, the character of the criminal activity occurring at the Wilson residence does not appear to have been a one-time occurrence or "chance encounter." Emmett advised Trooper Green that he purchased two different types of drugs, marijuana and Oxycontin, at the Wilson residence on two different, if successive, dates. Emmett also advised law enforcement that the Oxycontin tablets were kept in a steel box located next to a chair inside the Wilson residence. These observations by Emmett support a finding that there was a "regenerating conspiracy" to traffic in controlled substances occurring at the Wilson residence.

The second variable of the *Hause* test, whether the alleged criminal is "nomadic or entrenched," cannot be determined from the record in this case.

The third *Hause* variable appears to support the circuit court's finding that the information was stale. The items to be seized, Oxycontin tablets and marijuana, were "perishable and easily transferable," as will almost always be true in a drug case, which would tend to make information concerning their whereabouts, such as that obtained in this case from Emmett, reliable for a shorter period of time.

As to the final variable discussed in *Hause,* whether the place to be searched is a mere forum of convenience or constitutes a secure operational base, there is not a

great deal of evidence in the record, except that the Wilsons lived in the house and there had been two transactions conducted there. While perhaps not conclusive, this would seem to support regarding the house as a "secure operational base."

The Commonwealth argues that Trooper Green's testimony concerning his observation of abnormal foot traffic provides additional evidence to demonstrate both a "regenerating conspiracy" and that the residence was a "secure operational base for entrenched criminal activity." However, Trooper Green failed to include in his affidavit for a search warrant any mention of surveillance of the Wilson residence.[3] The decision to issue a search warrant must be considered based solely on the facts contained within the four corners of the affidavit. *Crayton v. Commonwealth*, 846 S.W.2d 684, 689 (Ky. 1992). As such, Trooper Green's testimony concerning any facts that are not within the four corners of his affidavit cannot be considered, as to either of these factors.

Thus, our analysis of the *Hause* factors shows that two of those factors, while not overwhelming, point toward a finding that the evidence was not stale, even after a nine-day delay. One factor points the other way and one is inconclusive. Clearly, this is a very close case. However, the original finder of fact in this matter, as to probable cause, was the district court and we grant "great deference" to its findings. Therefore, based on the totality of the circumstances, we hold that there was a "substantial basis for concluding that a search would uncover evidence of wrongdoing," *Lovett v.*

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[3] The affidavit stated only that, "Acting on the information received, Affiant conducted the following independent investigation: Affiant went to the location in police cruiser and located said residence as described by Mr. Emmett in Wells Camp where aforementioned transaction was executed."

Commonwealth, supra., and that the district court's finding that probable cause did continue to exist despite the nine-day delay, was supported by substantial evidence.

Our conclusion further is supported by *Johnson v. Commonwealth*, 180 S.W.3d 494, 500 (Ky.App. 2005), in which this Court held that probable cause existed to issue a search warrant for a residence when the affidavit demonstrated that the basis of the informant's knowledge of Johnson's trafficking and possession of methamphetamine was the informant's first-hand presence and observations at Johnson's house within a week prior to issuance of the search warrant.

We are also persuaded by several cases from other jurisdictions which have determined that probable cause does not dissipate, even in drug cases where the evidence is perishable and easily transferable, merely because of a relatively short passage of time between law enforcement receiving information and the issuance of a search warrant. In at least seven different cases, *United States v. Tabares*, 951 F.2d 405, 408 (1st Cir. 1991); *United States v. Scalia*, 993 F.2d 984, 986-88 (1st Cir. 1993); *United States v. Davis*, 276 F.Supp.2d 522, 526-27 (E.D.Va. 2003); *State v. Gieseke*, 328 So.2d 16 (Fla. 1976); *Vinson v. State*, 843 So.2d 229, 233-34 (Ala. 2001); *State v. Greene*, 81 Conn.App. 492, 500, 839 A.2d 1284, 1290 (2004); and *Copeland v. State*, 273 Ga.App. 850, 853 616 S.E.2d 189, 192 (2005), the courts held that information based on personal observation by informants of drug trafficking or possession 10 days prior to the issuance of a search warrant, was not stale for purposes of finding probable cause to issue the warrant.

Based on the foregoing, the Bell Circuit Court's November 21, 2006, order suppressing all evidence seized from the Wilson residence pursuant to the December 28, 2005, search warrant is hereby reversed and this matter is remanded to the circuit court for further proceedings consistent with this opinion.

CLAYTON, JUDGE, CONCURS.

GUIDUGLI, SENIOR JUDGE, DISSENTS.

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