

RENDERED: FEBRUARY 5, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000424-MR

MICHAEL J. ELLENBERGER

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 06-CR-00173

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2009-CA-000425-MR

AMANDA RILEY

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 06-CR-00175

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Michael J. Ellenberger and Amanda Riley were arrested on October 5, 2006, and later indicted on multiple drug-related charges. They each entered conditional guilty pleas to a number of these charges but reserved the right to appeal the Marshall Circuit Court's denial of their combined motion to suppress evidence taken from a residence pursuant to a search warrant.² They specifically contend that the circuit court's decision was in error because: (1) the search warrant and supporting affidavit wrongly identified the premises to be searched; and (2) the search warrant was not supported by probable cause. After our review, we reject both arguments and affirm as to both appeals.

On October 4, 2006, at approximately 11:07 p.m., Detective Kevin Mighell of the Marshall County Sheriff's Office and the Pennyriple Narcotics Task Force filed an affidavit for a search warrant in the Marshall District Court. The address given in the affidavit for the property to be searched was "1590 Olive-

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² The parties' appeals were consolidated by order of this Court on May 15, 2009 since they involve the same subject incident and the same issues. The parties are also represented by the same counsel.

Hamlet Road, Benton, Kentucky 42025.” The affidavit described the property more particularly as follows:

From the Marshall County Sheriff’s Office, turn left onto Ky. Hwy. 348 and travel 0.2 miles to Main Street. Turn right onto Main Street and travel approximately 0.4 miles, then turn left onto KY Hwy 408. Travel on Ky Hwy 408 for approximately 3.5 miles, then turn right onto Olive-Hamlet Road. Travel approximately 1.5 miles, and 1590 Olive-Hamlet Road will be on the right. It is a white basement house with a dark roof, with a large garage approximately 10 yards from the residence. There is also a large blue boat currently parked in the yard next to the residence.

As grounds for the search warrant, the affidavit contained the following information:

On the 4 day of October, 2006, at approximately 21:10 a.m./p.m., affiant received information from/observed: Affiant is a narcotics detective with the Marshall County Sheriff’s Office. Over the past 2-3 months during 2006, Affiant has driven by the above-described residence on numerous occasions. Affiant has noticed an unusually large amount of vehicular and people activity at and around the said residence. Said activity includes cars and people coming and going at all hours of the night and people going into the residence, staying for only a short period of time, and then leaving. Affiant has also received numerous complaints from neighbors regarding a high amount of vehicular and people activity at all hours of the day and night.

Affiant was contacted by Deputy Steven Oakley of the Marshall County Sheriff’s Department and Sgt. Tracy Watwood of the Benton Police Department. Oakley and Watwood reported that they were out at the above-described residence at about 9:10 p.m. on October 4, 2006. Oakley and Watwood conducted surveillance

about 50 yards from the residence. Oakley and Watwood stated that they heard a clanking sound which sounded like what they believed to be metal tanks being carried around. Oakley and Watwood also stated that they both smelled a strong odor of anhydrous ammonia coming from the residence. Both Oakley and Watwood observed several people at the residence and observed two different cars, one leaving and one coming, from the residence. There is not a farm at the above-described residence.

Soon thereafter, Marshall County District Judge Jack Telle found probable cause for a search and issued a search warrant bearing the exact same property description provided above.

Police executed the search warrant the following morning at approximately 1:15 a.m. However, instead of searching the premises at 1590 Olive-Hamlet Road, the address provided in the warrant and supporting affidavit, they actually searched those at 1594 Olive-Hamlet Road. Both Ellenberger and Riley were present at the time of the search. The search did not produce any anhydrous ammonia or metal tanks that appeared to have been used to store such. However, police recovered multiple other items, including plastic bags containing methamphetamine, a bag of marijuana, drug paraphernalia, digital scales, prescription medications, a number of firearms, and over \$2,500.00 in cash.

Ellenberger was indicted on charges of first-degree trafficking in a controlled substance, firearm enhanced; possession of marijuana, firearm enhanced; and possession of drug paraphernalia (second offense), firearm enhanced. Riley was indicted on charges of first-degree trafficking in a controlled

substance, firearm enhanced; possession of marijuana, firearm enhanced; possession of drug paraphernalia, firearm enhanced; third-degree possession of a controlled substance, firearm enhanced; and second-degree possession of a controlled substance, firearm enhanced. Appellants pled “not guilty” to all of the charged offenses.

They subsequently filed a joint motion to suppress the evidence that was taken from the residence. They argued that the affidavit used to secure the search warrant was defective and that it failed to establish probable cause for a search. A hearing on the motion was held on May 21, 2007.

At the hearing, Detective Mighell was the only witness to testify. He reiterated the information provided in the affidavit and noted that he had personally received several complaints from neighbors of the subject residence about possible drug activity, loud music, and constant late-night traffic in and out of the house. Because of this information, he had Officers Oakley and Watwood conduct surveillance on the residence, and they reported their observations to him. Detective Mighell also testified that the discrepancy between the address provided in the affidavit and the address of the residence that was actually searched was a typographical error. He further explained that the property description given in the affidavit accurately reflected the residence to be searched. On cross-examination, Detective Mighell acknowledged that he did not know who was living at the residence at the time or if they were actually involved in drug-related activity. He also indicated that he did not find or smell any anhydrous ammonia while

conducting the search, but he noted that a number of vehicles had come and gone from the residence prior to the search warrant being executed.

On June 29, 2007, the circuit court entered an order denying Appellants' motion to suppress. The court first found, after considering the totality of the circumstances, that the search warrant in question was properly issued because the affidavit that led to the warrant stated information that was not controverted. The court added that while there might have been statements made in the affidavit that were not later substantiated, this alone did not render the warrant invalid. The court further found that although the search warrant contained the wrong address, the evidence reflected that this was a mere typographical error and that the property sought to be searched was otherwise accurately described in the body of the warrant. Therefore, the fact that the warrant contained an incorrect address was not enough to invalidate it.

On December 15, 2008, Ellenberger filed a motion to enter a conditional guilty plea to amended charges of first-degree trafficking in a controlled substance; possession of marijuana, firearm enhanced; and possession of drug paraphernalia (second offense). In doing so, he expressly reserved the right to challenge the circuit court's denial of the motion to suppress. On that same date, Riley filed her own motion to enter a conditional guilty plea to charges of first-degree trafficking in a controlled substance; possession of marijuana, firearm enhanced; possession of drug paraphernalia, firearm enhanced; and third-degree possession of a controlled substance, firearm enhanced. She also reserved the right

to challenge the circuit court's order. On February 20, 2009, the circuit court entered separate judgments finding Appellants guilty of the aforementioned charges and imposing a sentence of five years' imprisonment on each of them. However, those sentences were each probated for a term of five years. Appellants then filed the current appeals.

On appeal, Appellants again argue that the circuit court erred in denying their joint motion to suppress because the search warrant in question was invalid. They contend that: (1) the property description contained within the affidavit filed in support of the warrant was inaccurate; and (2) the search warrant was not supported by probable cause. We address each contention in turn.

The standard of review for the denial of a motion to suppress is set forth in *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky. App. 2002). It "requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive." *Id.* at 923; *see also* Kentucky Rules of Criminal Procedure (RCr) 9.78. "Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Neal*, 84 S.W.3d at 923; *see also Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). The facts here are undisputed. Therefore, our only consideration is whether the circuit court's decision was the correct one given those facts.

Appellants first argue that the search warrant was invalid because it contained an incorrect address. Both Detective Mighell's affidavit and the search

warrant itself show the address of the property to be searched as “1590 Olive-Hamlet Road, Benton, Kentucky 42025.” However, this address was apparently the incorrect one, and the warrant was actually executed at 1594 Olive-Hamlet Road, Benton, Kentucky, 42025. Appellants argue that this discrepancy alone is enough to render the affidavit – and the resulting search warrant – invalid because the inclusion of the incorrect address was a misleading and false statement presented under oath and suggests that police had the wrong property under surveillance. Appellants also complain that the affidavit does not specifically state that the property to be searched was in Marshall County. We find these arguments to be unavailing.

Both Section 10 of the Kentucky Constitution³ and the Fourth Amendment to the United States Constitution⁴ require a search warrant to state and describe with particularity the property to be searched. *Fentress v.*

Commonwealth, 279 S.W.3d 168, 171 (Ky. App. 2008); *McCloud v.*

Commonwealth, 279 S.W.3d 162, 164 (Ky. App. 2007). “This particularity requirement is satisfied if the description in the search warrant enables the officer executing the warrant to identify the place to be searched with reasonable effort.”

McCloud, 279 S.W.3d at 165. Thus, the use of an incorrect address, in and of

³ Section 10 provides: “The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and 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.”

⁴ The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

itself, is not enough to render a search warrant invalid as long as other information within the warrant identifies the property to be searched with particularity and allows police to correctly identify it. *Id.* at 165-66.

Detective Mighell testified during the suppression hearing that the inclusion of the incorrect evidence in his affidavit was a mere typographical error that occurred when the person preparing the affidavit typed the wrong address – 1590 Olive-Hamlet Road – instead of the one that Mighell actually gave him – 1594 Olive-Hamlet Road. There is no evidence in the record that the use of an incorrect address led to confusion in serving the search warrant or that such was done consciously or with intent to deceive the district judge.

Moreover, it appears that the affidavit and search warrant otherwise provided an accurate physical description of the property to be searched and correctly directed police to the property's exact location. The warrant described the premises as a "white basement house with a dark roof, with a large garage approximately 10 yards from the residence" and gave specific directions to that residence. Detective Mighell testified that the property at 1594 Olive-Hamlet Road was the only property in the area that matched this description. He was also the affiant *and* the executing officer in this case; therefore, he was aware of which property was to be searched and a mistaken search was unlikely. *See United States v. Durk*, 149 F.3d 464, 466 (6th Cir. 1998). The fact that the affidavit and search warrant failed to contain specific mention of Marshall County is also not grounds to invalidate the warrant since they clearly provided that the subject property was

in Benton, Kentucky. *See Grogan v. Commonwealth*, 222 Ky. 484, 1 S.W.2d 779, 780 (1927). Accordingly, we believe that the “particularity” standard was met in this case, and Appellants’ arguments to the contrary must be rejected.

Appellants next argue that the search warrant was not supported by probable cause, rendering it invalid. “It is fundamental that a search warrant may only be issued upon a finding of probable cause.” *Fentress*, 279 S.W.3d at 171. The determination of whether probable cause existed in a particular case is confined to consideration of the affidavit filed in support of the warrant. *Robinson v. Commonwealth*, 550 S.W.2d 496, 497 (Ky. 1977). We must “review the sufficiency of an affidavit underlying a search warrant in a commonsense, rather than hypertechnical, manner.” *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005). If the entity issuing a search warrant had a substantial basis for concluding that a warrant would uncover evidence of wrongdoing, no error of a constitutional nature exists. *Id.*

Ultimately, whether probable cause existed for the issuance of a search warrant is determined under a “totality of the circumstances” standard. *Id.* “[T]he test for probable cause is whether there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Id.* “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.” *Id.*

Appellants initially contend that probable cause for a search warrant did not exist in this case because the affidavit reflects that the officers did not

personally observe any definite illegal activity on the subject premises. However, “[p]robable cause does not require certainty that a crime has been committed or that evidence will be present in the place to be searched.” *Id.* Probable cause, by its very name, instead only addresses itself to the probability of criminal activity in a particular situation. Thus, the fact that the affidavit did not make a clear showing of criminal activity does not necessarily render the search warrant fatally flawed.

Instead, after considering the affidavit and giving due deference to the district judge’s finding of probable cause, we conclude that the circuit court did not err in denying Appellants’ motion to suppress because the totality of the circumstances justified such a finding. Our conclusion is primarily supported by our decision in *Drake v. Commonwealth*, 222 S.W.3d 254 (Ky. App. 2007), in which we held that the odor of anhydrous ammonia, taken in conjunction with other facts and circumstances, can provide sufficient probable cause for the issuance of a search warrant because it is a key component in the manufacture of methamphetamine. *See id.* at 256; *Hallum v. Commonwealth*, 219 S.W.3d 216, 219 n.3 (Ky. App. 2007).

Here, two police officers who were conducting surveillance of the subject property told Detective Mighell that they smelled a strong odor of anhydrous ammonia coming from the residence. Anhydrous ammonia is commonly used as a fertilizer for agricultural purposes, *see Fulcher v. Commonwealth*, 149 S.W.3d 363, 369 (Ky. 2004), but the affidavit reflected that

the subject property was not located on a farm.⁵ The officers also reported that they heard the clanking of metal tanks being moved around on the premises, which is notable because such tanks are often used to hold anhydrous ammonia.

Appellants complain that these reported facts are suspect because no anhydrous ammonia or corresponding holding tanks were ultimately found on the scene. But as noted above, probable cause only requires a “fair probability that contraband or evidence of a crime will be found in a particular place.” *Moore*, 159 S.W.3d at 329. It “does not require certainty that a crime has been committed or that evidence will be present in the place to be searched.” *Id.* Thus, the fact that the search failed to produce these items, in and of itself, does not negate the district court’s findings of probable cause. However, we also note that officers did find a number of plastic bags containing methamphetamine on the premises.

The officers’ observations were buttressed by the fact that neighbors had complained to Detective Mighell about unusually large amounts of traffic around the residence at unusual hours, which can be a factor supporting a finding of probable cause. *See United States v. Williams*, 224 F.3d 530, 532 (6th Cir. 2000). Detective Mighell also personally observed the residence for a number of months and drove by it on numerous occasions. In doing so, he “noticed an unusually large amount of vehicular and people activity at and around the said residence. Said activity includes cars and people coming and going at all hours of the night and people going into the residence, staying for only a short period of

⁵ During the suppression hearing, Detective Mighell clarified that while the subject property was in a rural area, there were no fields or farms nearby.

time, and then leaving.” This, too, supports a finding of probable cause. *See United States v. Hernandez Leon*, 379 F.3d 1024, 1028 (8th Cir. 2004).

While it is arguable that none of the aforementioned facts, standing alone, would be sufficient to support a finding of probable cause, when they are taken together and considered as a whole, they support the district court’s determination. Again, we emphasize that “great deference” must be given “to the warrant-issuing judge’s findings of probable cause” and those findings “should not be reversed unless arbitrarily exercised.” *Moore*, 159 S.W.3d at 329. We do not believe that the district court arbitrarily found probable cause here. Thus, we hold that the circuit court did not err in denying Appellants’ motion to suppress, and their appeals must consequently be rejected.

The judgments of the Marshall Circuit Court as to both Appellants are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Benjamin J. Lookofsky
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky