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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001506-MR

RONALD NELSON JOHNSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 09-CR-00318-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, LAMBERT AND THOMPSON, JUDGES.

ACREE, JUDGE: The issues presented in this appeal are threefold. The first is whether the trial court erred by enforcing the Commonwealth's privilege against revealing the identity of a confidential informant (CI) for purposes of a suppression hearing. The next issue is whether the criminal defendant's subpoena *duces tecum* requesting a copy of a police evidence log was properly quashed. Finally, we must

assess whether the defendant's entry of a conditional guilty plea was rendered involuntary because it was not "rooted in fact."

Facts and procedure

In January 2009, the Lexington Police Department sought a warrant authorizing a search of the home of Ronald Johnson for evidence that he was trafficking in a controlled substance. The request was supported by the affidavit of Detective John McBride. That affidavit made several representations; the relevant ones follow:

- A CI informed police that Johnson was selling crack cocaine from his residence while children were present.
- Said CI had worked with Lexington police in the past, and had "demonstrated truthfulness and accuracy[.]"
- An independent investigation verified the information the CI provided regarding Johnson. More specifically, Detective McBride, accompanied by another detective of the Lexington Police Department, observed activity outside Johnson's home that was consistent with drug trafficking.
- The detectives, with the help of the CI, conducted a "controlled buy," during which Johnson sold crack cocaine to the CI.

In no portion of the affidavit was the identity of the CI revealed.

The Fayette Circuit Court issued the warrant. It was executed, and a search revealed crack cocaine and drug paraphernalia in Johnson's home. Police also discovered an assault rifle in the closet of the master bedroom and marijuana in a sweatshirt lying on the living room floor.

On the basis of this evidence, Johnson was charged with first-degree trafficking in a controlled substance, first-degree complicity to traffic in a

controlled substance, possession of a firearm by a convicted felon, fourth-degree controlled substance endangerment to a child, possession of drug paraphernalia, and possession of marijuana. He was not charged with any crime arising out of the controlled buy.

Johnson's attorney pursued a series of pretrial tactics designed to call into question the adequacy of the search warrant. The first was a motion entitled "Motion for further discovery and for [exculpatory] and impeachment evidence." In that motion, Johnson requested that the circuit court order the Commonwealth to reveal the identity of the CI, claiming the CI possessed information necessary to Johnson's defense. A subsequent motion asserted the warrant was constitutionally inadequate, and therefore the fruits of the search should be suppressed. Finally, Johnson's attorney attempted to serve upon Detective McBride a subpoena *duces tecum* requesting the police department's evidence logs from the controlled buy which led to issuance of the warrant. The Commonwealth moved to have the subpoena quashed.

Johnson's strategy was unsuccessful on all fronts. The circuit court concluded the CI's identity should not be revealed, quashed the subpoena *duces tecum,* and upheld the validity of the warrant and the admissibility of the evidence obtained thereunder.

Johnson entered a guilty plea on five counts,[1] conditioned on his right to appeal the circuit court's rulings on the pretrial motions. He was sentenced to serve a total of seven years' imprisonment.[2]

On direct appeal, Johnson asserts as error the circuit court's refusal to order the Commonwealth to reveal the identity of the CI and the quashing of the subpoena *duces tecum*. Johnson claims as a collateral matter that the circuit court erroneously accepted his plea of guilty on two charges, possession of a firearm by a felon and possession of marijuana, because the plea colloquy did not establish that those charges were rooted in fact.

Identity of the confidential informant

Johnson first claims the CI's identity should have been revealed because the CI's testimony was material to his case for purposes of a suppression hearing. It is not clear from his brief what he intended to accomplish by interrogating the CI at a suppression hearing, though he represented to the circuit court that the CI's identity was necessary for him to formulate an "alibi defense." This statement leads us to believe his goal was to demonstrate that the warrant was based upon false or otherwise unreliable representations by the CI (*e.g.*, that Johnson could not possibly have sold drugs to the CI at the time and date asserted

[1] Johnson pleaded guilty to first-degree possession of a controlled substance, possession of a firearm by a convicted felon, fourth-degree controlled substance endangerment to a child, possession of drug paraphernalia, and possession of marijuana.

[2] His sentence was suspended, and Johnson was placed on probation for five years, with the requirement that he serve fourteen weekend days in the Fayette County Detention Center. At the time of sentencing, Johnson had already served thirty-one days' incarceration

because he was somewhere else), and all evidence discovered under the authority of the warrant would accordingly be inadmissible.

Kentucky Rule of Evidence (KRE) 508 governs when the Commonwealth is required to disclose the identity of a confidential informant.[3] Under this rule, "a defendant who requests disclosure of the identity of an informant must first make a proper showing that an exception applies [to the general rule that informants' identities are privileged]." *Heard v. Commonwealth,* 172 S.W.3d 372, 374 (Ky. 2005). Upon such showing, the burden shifts "to the Commonwealth to establish why the informant's identity should remain concealed." *Id.* at 375.

Because the circuit court's decision turns on a delicate balancing of competing interests which will necessarily vary from case to case, we will reverse a decision of whether to reveal a CI's identity only upon a showing that the circuit court abused its discretion. *See Rovario,* 353 U.S. 53 at 61 ("The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of the case[.]).

Johnson convinced the circuit court, as a preliminary matter, that the CI would be able to provide relevant testimony. The Commonwealth was then permitted to argue *in camera* against revealing the CI's identity. Following the Commonwealth's response, the circuit court concluded disclosure was not proper

[3] KRE 508 is essentially a codification of the ruling in *Rovario v. U.S.,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). *Taylor v. Commonwealth,* 987 S.W.2d 302, 304 (Ky. 1998).

for two reasons: (1) because the CI's testimony would not be part of the Commonwealth's proof or the charges against Johnson; and (2) because revealing the identity would risk the health and safety of the CI. Both of these considerations were proper. *Heard,* 172 S.W.3d at 374.

On appeal, Johnson has raised no facts or arguments which indicate that the circuit court abused its discretion in denying disclosure of the CI's identity. More precisely, he has asserted no particularized facts which show the CI's testimony would be relevant to his case, even at a suppression hearing. Instead, he raises the vague protest that "the trial court deprived Mr. Johnson of his defense." (Appellant's Brief, p. 9). However, "[m]ere speculation that identity of an informant is necessary to a defense is not enough [to justify an exception to the privilege of nondisclosure]." *Schooley,* 627 S.W.2d at 578. Rather, "there must be some showing that disclosure will be relevant and helpful to the defense." *Id.* If Johnson truly believed the CI's testimony could have established that the warrant was based upon false information, he should have explicitly represented as much and included the basis for his belief in his appellate brief. As it stands, however, we cannot say the circuit court abused its discretion.

Evidence log

Johnson also asserts as error the circuit court's decision to quash the subpoena *duces tecum* of the police evidence log which presumably recorded the date of the controlled buy and the quantity of cocaine the CI received from Johnson. Unfortunately, Johnson cites no legal authority which governs the

principles the circuit court should have applied or the standards which merit reversal by this Court, and which would offer coherence to the argument. Rather, Johnson cites two cases which do not speak to the permissibility of quashing a subpoena *duces tecum*. Those cases are: *Tinsley v. Jackson,* 771 S.W.2d 331 (Ky. 1989), in which the Supreme Court addressed the ability of a defendant to receive a fair trial given significant physical evidence which had been misplaced; and *Commonwealth v. Davidson,* 277 S.W.3d 232 (Ky. 2009), which Johnson cites only for a definition of "trial error." Neither case is instructive to this Court or supportive of the argument. We decline to further consider this argument. *See Hadley v. Citizen Deposit Bank,* 186 S.W.3d 754, 759 (Ky. App. 2005)("It is not our function as an appellate court to research and construct a party's legal arguments, and we decline to do so here.").

Guilty plea

Finally, Johnson contends the circuit court erred in entering his guilty plea on the charges of possession of a firearm by a convicted felon and possession of marijuana. He claims his statements during the plea colloquy, that he did not commit the two offenses but wished to plead guilty nevertheless, rendered the plea invalid.

Johnson concedes he did not preserve this argument before the circuit court. He neither entered a motion to withdraw the plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.10, nor presented his collateral attack to the circuit

court by way of an RCr 11.42 motion. Accordingly, our review is governed by RCr 10.26, which provides:

> A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

RCr 10.26.

The portions of the plea colloquy relevant to Johnson's argument follow:

> **The court:** Have you all talked about - you and your attorney - talked about what the Commonwealth would have to prove to convict you of the offenses charged in the indictment?
>
> **Johnson:** Yes, sir.
>
> **The court:** Have you also talked about lesser offenses, possible defenses if we went to trial?
>
> **Johnson:** Yes, sir.
>
> **The court:** Knowing all of this, you tell me that you are in fact guilty of first-degree trafficking, I understand that it is possession with intent, first-degree trafficking in cocaine, convicted felon in possession of a firearm, controlled substance endangerment to a child in the fourth degree, drug para – possession of drug paraphernalia, and possession of marijuana. Are you guilty of those five things, sir?
>
> **Johnson's trial counsel:** He – he's admitting guilt and

he believes that on some of the – on some of the – on some of them he's afraid that – he's admitting legal guilt, but some of them we

feel are weak, but he's afraid a jury could convict him of some of them.

Commonwealth's attorney: It's not an *Alford* plea.

Johnson's trial counsel: On trafficking –

The court: I – I don't think we're talking about an *Alford* plea, are we?

Johnson: Yes, sir. Yes, sir.

The court: This is not an *Alford* plea, either you know – you're saying, the evidence may be stronger or weaker in any individual charge, but you're telling me you're guilty of those five things, sir?

Johnson: Yes, sir, I am.

. . . .

The court: Did you in fact commit the crimes of first-degree trafficking cocaine, convicted felon in possession of a firearm, controlled substance endangerment to a child, possession of drug paraphernalia, and possession of marijuana on this occasion, which the indictment says was January 13th of '09? Did you commit those offenses, sir, on January 13th of [2009]?

Johnson: Yes, sir.

. . . .

The court: Did you also have a firearm in your possession, or around your apartment there somewhere?

Johnson: There was a firearm, your honor, that was in my closet. I was – was unaware that the gun was in the house, but it was there, and being that I'm a convicted felon, I know that I cannot have a firearm anywhere in my household, your honor. I am guilty of possession of a firearm.

. . . .

The court: Also, did you have some marijuana there in the apartment?

Johnson: There was marijuana in – in the house. It was in a [sweatshirt] that was on the floor, your honor. They said- I never saw it, but they said it was there. I'm not going to argue whether or not the marijuana was there or not. So yes, sir.

Significantly, throughout the plea colloquy, Johnson repeatedly informed the circuit judge that he understood the charges, his defenses, the rights he retained, and the rights he was waiving by entering a guilty plea. His attorney's representations to the circuit court confirmed Johnson's sworn statements.

A circuit judge is not permitted to accept a plea of guilty absent a determination "that the plea is made voluntarily with understanding of the nature of the charge." RCr 8.08. This requirement reflects the holding of *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Johnson asserts the colloquy conducted by the circuit court revealed that his plea was not rooted in fact on the charges of possession of marijuana and possession of a handgun by a convicted felon, and that the circuit court therefore

erred when it accepted the plea on those counts. In support of his argument, Johnson cites *Hargrave v. Commonwealth,* 724 S.W.2d 202 (Ky. 1986).

Hargrave, however, does not speak to the issue now before the Court. The Supreme Court in *Hargrave* was faced with the following scenario: the defendant entered a guilty plea in 1977 to trafficking heroin and represented to the trial court that he had, in fact, committed the offense. Several years later, when he was convicted of trafficking in cocaine, Hargrave wished to have the 1977 conviction suppressed during the persistent felony offender (PFO) stage of trial. *Id.* at 205. The basis of this argument was that in 1977 he had mistakenly admitted to trafficking in heroin, because he believed he had been charged with mere *possession* of heroin. *Id.* Accordingly, Hargrave contended, the 1977 plea had no basis in fact and should be suppressed. *Id.*

The Supreme Court ruled that in the face of the conflicting testimony (his sworn statement that he did traffic in heroin, then his subsequent claim that he did not), the fact that Hargrave had been found with twenty bags of heroin constituted a sufficient factual basis for the circuit court to rule the 1977 guilty plea was valid and eligible for consideration for a PFO charge. *Id.* at 206. There is no requirement in *Hargrave* that a defendant admit actual guilt when entering a guilty plea.

The Commonwealth argues there is no constitutional requirement whatsoever that the defendant admit to each underlying fact supporting the charges against him. We agree.

> [W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

U.S. v. Tunning, 69 F.3d 107, 110 (6th Cir. 1995) (citing *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)). This rule has been applied even in cases in which the defendant entered an ordinary guilty plea, as opposed to an *Alford* plea. *See, e.g., Roddy v. Black,* 516 F.2d 1380 (6th Cir. 1975).

Indeed, "there is no *constitutional* requirement that a trial judge inquire into the factual basis of a guilty plea." *Id.* at 1385 (emphasis added). The source of that requirement is *procedural*. *Id.*; Federal Rule of Criminal Procedure 11 ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").

Further, "Rule 11 is a federal procedural rule, which must be observed scrupulously by the federal courts[; however, the] precise terms of Rule 11 are not constitutionally applicable to the state courts." *Id.* at 1383 (citations omitted). Johnson has identified no corresponding procedural rule in Kentucky which requires that a trial court ensure there is a factual basis for the plea. Our research has revealed no such rule.

In light of his repeated representations to the circuit court that he was guilty of all charges identified in the plea agreement and that he desired to enter a

guilty plea, we find no manifest injustice in the circuit court's acceptance of Johnson's guilty plea.

Conclusions

We are not persuaded that the entry of judgment against Johnson should be disturbed. Johnson has not established that the circuit court abused its discretion in concealing the identity of the Commonwealth's confidential informant. He has presented no legal argument that the subpoena *duces tecum* was improperly quashed. He has likewise presented no reason the circuit court improperly accepted his plea of guilty. Accordingly, we affirm.

LAMBERT, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: I concur with the majority's opinion but write separately to express the reasoning for my concurrence.

I likewise believe that the proper procedure is to excise the CI-related information and apply the probable cause standard to the remaining information in the affidavit. If the affidavit continues to support a finding of probable cause, I would not invalidate the search warrant despite the non-disclosure of the CI's identity. *United States v. Karo*, 468 U.S. 705, 721, 104 S.Ct. 3296, 3306, 82 L.Ed.2d 530 (1984) (after facts are stricken from a search warrant, the warrant is still valid if probable cause remains).

In the instant case, the search warrant affidavit contains information

that Detective McBride observed several people enter Johnson's residence for three to five minutes and then leave. The affidavit further contains a statement that Detective McBride observed one of the suspected drug buyers examine their purchased product. Based on these facts, the search warrant affidavit, after striking the CI-related information, contained sufficient information to permit a finding of probable cause that evidence of drugs would be found in Johnson's residence. *Id*.

Additionally, I write to express my displeasure with practices of the police in this case regarding the acceptance of service of process. The defense counsel attempted to serve a subpoena *duces tecum* on Detective McBride, a narcotics officer, but was unsuccessful because he was not in his office. She then attempted to serve Detective McBride's shift supervisor but he refused to accept service. It goes without saying that locating a narcotics officer can be difficult because their location will not be readily disclosed by their department for obvious reasons. Under these circumstances, police should have a formalized system in which defense counsel can serve process on an officer even if he or she is not physically present in their office.

In this case, defense counsel was hampered and frustrated in her efforts to obtain police records from the narcotics officer possessing the information. Such actions are a disservice to the general public and to our criminal justice system. However, having stated this, I find that this hindering conduct was harmless beyond doubt because the requested records related to the CI's information. If the CI's statements and activity were completely removed from this case, a trial court could have still found probable cause to issue the search warrant. Thus, any error

related to the conduct of the police in the instant case was harmless.

I further find a fatal flaw in Johnson's entire appeal due to the fact that there was no suppression hearing held or order issued after the in camera hearing. If there is no ruling made after a defendant has moved to suppress, the defendant cannot claim error on appeal because the objection is considered waived. *Bell v. Commonwealth*, 473 S.W.2d 820, 821 (Ky. 1971). Therefore, I believe that counsel's failure to require a suppression hearing and order is fatal to this appeal. *Id*.

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