

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-001455-MR

MICHAEL DWAYNE BROWN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 12-CR-00094

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; KRAMER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Michael Dwayne Brown appeals from a judgment entered pursuant to a conditional plea following the denial of a motion to suppress evidence discovered pursuant to execution of a search warrant. Brown argues there was lack of probable cause to issue the search warrant because it was based upon a warrant affidavit containing material falsities.

In 2011, Officer Matthew Maynard of the Lexington-Fayette Urban County Division of Police applied for a search warrant to search the ground floor right side apartment in a four-plex at a named address for heroin, drug paraphernalia, other drugs and precursors. Officer Maynard's affidavit in support of the search warrant stated that on November 30, 2011, a qualified confidential informant advised him that "Mike" was selling heroin from his apartment at the named address and lived there with his girlfriend and children. As to the confidential informant's past reliability, Officer Maynard stated as follows:

The qualified confidential informant who provided the information contained in this affidavit has provided information to the Narcotics Unit on multiple occasions in the past. The qualified confidential informant has demonstrated truthfulness and accuracy and the information provided has been verified via independent investigation.

Officer Maynard then described the independent investigation conducted based on the confidential informant's tip:

On or about the 6<sup>th</sup> day of December 2012, the CI was escorted by affiant and another detective to the area of [the named address] and made a controlled purchase of an amount of heroin from "Mike". CI was observed by affiant and another detective entering and exiting the apartment building.

Within the last 48 hours, CI was escorted to the area of [the named address] and made a controlled purchase of an amount of heroin from "Mike". The CI was searched before and after all controlled purchases and no other narcotics were found. The CI observed the contraband inside the listed apartment and in the possession of "Mike". The CI was observed entering and exiting the

bottom floor, right hand side apartment of [the named address].

Affiant went to the area and confirmed the building in question, which was described by the CI as the second building on the left, coming from Winter Garden was in fact [the named address]. A check through police computers located a subject named Michael D. Brown [who] had been stopped for a traffic offense on 05/15/2008 and gave the address of [the named address].

Affiant then used the information from the police computer database and found a picture of the subject on the Lexington Fayette Urban County Jail website. The confidential informant was able to positively ID the picture as the subject known to them as “Mike”, but stated “Mike” now had shorter hair.

Based on the information received and the investigation that followed, affiant believes that evidence of heroin possession, use and/or trafficking will be located upon immediate search of [the named address], bottom right apartment, Lexington, Fayette County, Kentucky.

The district court approved the search warrant and upon its execution, heroin, cocaine, marijuana and drug paraphernalia were discovered. Brown was charged with (1) trafficking in a controlled substance first degree (greater than or equal to four grams of cocaine), (2) trafficking in a controlled substance first degree (greater than or equal to two grams of heroin), (3) possession of drug paraphernalia, (4) possession of marijuana and (5) persistent felony offender (PFO)

I.

Brown moved to suppress evidence obtained pursuant to the search warrant, arguing the search warrant was insufficient on its face and there was a

lack of probable cause based upon the warrant affidavit. Detective Keith Ford and Officer Maynard testified at the suppression hearing.

Officer Maynard testified he and Detective Ford prepared his affidavit. Although Officer Maynard had not previously worked with the confidential informant, he relied on Detective Ford's prior experience with the confidential informant when he attested to the confidential informant's reliability.

Detective Ford testified the confidential informant had a long history of reliable work for the department and he worked with her on five previous occasions. Although the affidavit did not indicate there was any agreement with the confidential informant, Detective Ford testified his department entered into an unofficial agreement with the confidential informant that if she helped them find evidence of more serious crimes, her pending charges would be reduced or dismissed.

Both officers testified they searched the confidential informant before she entered the same apartment specified on the search warrant to ensure she was buying drugs from that location. While Detective Ford was not certain if he saw her enter the apartment during the first buy, the specifics of the first buy were only recited to give history and not for establishing probable cause. Detective Ford testified he did see the confidential informant enter the building and apartment for the second buy. The officers did not provide the confidential informant with marked money or equip her with a recording device. On each occasion, the confidential informant returned with a quantity of suspected heroin.

Both officers testified the affidavit implied they determined the confidential informant bought heroin during each controlled buy, even though each time their identification of the substance as heroin was only based on their visual inspection. The officers testified they did not have testing performed on either substance collected to determine if it was heroin, even though field testing and lab testing were readily available.

The officers testified they believed the substances the confidential informant bought were heroin because they looked like heroin in color and consistency based on their experience and training. Detective Ford testified other substances could look like heroin and he could not be 100% certain each substance was heroin. Officer Maynard testified he relied upon both his own experience and Detective Ford's longer experience to conclude both substances were heroin.

Brown was never charged with any crime from the substances the confidential informant purchased. Instead, these buys served solely to establish the probable cause needed to obtain the search warrant.

The circuit court denied the motion to suppress, finding the warrant affidavit was sufficient to establish probable cause and while it would be better practice to state each substance was "suspected heroin" that stating it was heroin was not a falsity.

Brown entered into a conditional plea reserving his right to appeal on the suppression issue. Brown pled guilty to (1) first-degree trafficking in a controlled substance greater than or equal to four grams of cocaine, (2) an

amended charge of first-degree trafficking in a controlled substance, and (3) PFO I. The two misdemeanor counts were dismissed. Brown was sentenced to five years for first-degree trafficking in a controlled substance greater than or equal to four grams of cocaine, enhanced to ten years pursuant to being a PFO I, and one year for the first-degree trafficking in a controlled substance, to be served concurrently.

Brown timely appealed. He challenges the denial of his motion to suppress on the basis that the officer's affidavit supporting the application for the search warrant was intentionally false or made with reckless disregard for the truth by containing material omissions regarding its (1) description of the confidential informant, (2) problems with the controlled buys, and (3) follow-up investigation including failing to test the substances to determine whether they were heroin. Brown argues if the affidavit had revealed these weaknesses in the officers' investigation and if it had been purged of these falsities by removing tainted statements, the affidavit would not be sufficient to support a finding of probable cause. We disagree.

The proper test for appellate review of a suppression hearing ruling regarding a search pursuant to a warrant is to determine first if the facts found by the trial judge are supported by substantial evidence and then to determine whether the trial judge correctly determined that the issuing judge did or did not have a substantial basis for concluding that probable cause existed. In doing so, all reviewing courts must give great deference to the warrant-issuing judge's decision. We also review the four corners of the affidavit and not extrinsic evidence in analyzing the warrant-issuing judge's conclusion.

*Commonwealth v. Pride*, 302 S.W.3d 43, 49 (Ky. 2010) (internal quotations, citations and footnotes omitted).

In order to satisfy the Fourth Amendment's requirement that search warrants not be issued without probable cause, we apply the "totality of the circumstances" standard set out in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). *Minks v. Commonwealth*, 427 S.W.3d 802, 807-08 (Ky. 2014).

"[P]robable cause is a flexible, common-sense standard." *Williams v.*

*Commonwealth*, 147 S.W.3d 1, 7 (Ky. 2004). While conclusory allegations in a warrant affidavit are insufficient to establish probable cause, *Hensley v.*

*Commonwealth*, 248 S.W.3d 572, 576 (Ky.App. 2008), probable cause may be satisfied where "the facts available to the officer would 'warrant a man of reasonable caution in the belief,' that certain items may be contraband . . . or useful as evidence of a crime[.]" *Williams*, 147 S.W.3d at 7. Although a warrant affidavit should contain information the affiant appropriately believes to be true, *Blane v.*

*Commonwealth*, 364 S.W.3d 140, 146 (Ky. 2012), probable cause "does not demand any showing that such a belief be correct or more likely true than false[.]" *Williams*, 147 S.W.3d at 7.

If a warrant is challenged on the basis of the supporting affidavit's reliance on an informant's tip to provide probable cause, we determine whether such reliance was reasonable considering the informant's veracity, reliability, basis of knowledge and other indicia of reliability. *Lovett v. Commonwealth*, 103 S.W.3d 72, 77-78 (Ky. 2003). Essentially, the affidavit must provide some basis for

believing the tip to be credible. *Blane v. Commonwealth*, 364 S.W.3d 140, 146 (Ky. 2012). Where a confidential informant informs an officer that she could purchase contraband from the defendant and that is proved to be true, this establishes the informant was reliable as supported by substantial evidence. *Id.* at 147.

If the defendant seeks to suppress evidence by attacking a facially sufficient affidavit, the defendant must allege and prove by a preponderance of the evidence that the affidavit contains a falsehood that was either made deliberately or with reckless disregard for the truth, and that if the false material was removed the remaining material would be insufficient to establish probable cause. *Id.* at 146.

This same standard applies if an affidavit intentionally or recklessly omits material facts. *Commonwealth v. Smith*, 898 S.W.2d 496, 503 (Ky.App. 1995).

An affidavit will be vitiated only if the defendant can show that the police omitted facts with the intent to make, or in reckless disregard of whether the omission made, the affidavit misleading *and* that the affidavit, as supplemented by the omitted information, would not have been sufficient to support a finding of probable cause.

*Id.*

“Probable cause for a search requires something more than a bare suspicion but less than what is needed to support a conviction.” *Commonwealth v. Baldwin*, 199 S.W.3d 765, 768 (Ky.App. 2006). If evidence is sufficient to support a conviction, it also satisfies probable cause. Therefore, because convictions for offenses involving controlled substances have been upheld without chemical



analysis of the substance if there is appropriate circumstantial evidence presented that the substance is contraband, circumstantial evidence a substance is contraband is sufficient to establish probable cause. *See Jones v. Commonwealth*, 331 S.W.3d 249, 252-53 (Ky. 2011); *Chavies v. Commonwealth*, 354 S.W.3d 103, 112 (Ky. 2011).

Brown is incorrect that omissions should be corrected by entirely excluding statements containing omissions. Instead, the proper remedy is to examine if the omissions were included, whether probable cause would still be found. *Smith*, 898 S.W.2d at 503. Brown complained of omissions from the warrant affidavit that are minor and, if corrected through additions, would not serve to vitiate probable cause.

The omissions regarding the description of the confidential informant, which included the failure to explain what made the confidential informant reliable, the unofficial deal made with the confidential informant, and that Officer Maynard had not worked with the confidential informant before, were all immaterial. The measures the police took to ensure the confidential informant was obtaining the drugs from the targeted apartment and the results obtained from the controlled buys that substantiated her tip established she was reliable despite the undisclosed unofficial deal. The failure to disclose that Officer Maynard had not worked with this confidential informant before was unimportant because Detective Ford had a long history of working with the confidential informant and these officers conducted this investigation together.

Brown's argument that the affidavit failed to provide any details as to which apartment the confidential informant went to at the address is refuted by the text of the affidavit as confirmed by the suppression hearing testimony. The description of the apartment to be searched was sufficiently distinct to satisfy the relevant particularity requirements. *See id. at 500.*

The failure of the affidavit to specifically state that the officers did not see the buy, did not use marked money and did not use a recording device is irrelevant. There is no requirement that an affidavit state other things that could have been done, but were not done, in a particular investigation. The affidavit did not imply that the officers saw the buy, used marked money or used a recording device. Omitting what was not done could not constitute a falsehood.

Brown argues the affidavit contained material falsehoods because it did not disclose that the officers failed to perform any substantive follow-up investigation. He argues their investigation which only determined he lived in that apartment did not establish any criminality. He also argues including the statements that the substances were heroin even though no testing had established these substances were heroin and the officers knew there was uncertainty as to what the substances were, constituted reckless disregard for the truth. He argues if statements identifying the substances as heroin were omitted from the warrant affidavit, probable cause could not be established.

We disagree with Brown's conclusions. The investigation consisting of the controlled buys and identifying "Mike" provided probable cause to search

the apartment and Brown. There was no need to engage in any further substantive follow-up investigation.

We agree with the trial court that it would have been a better practice for the affidavit to explain that the substances obtained through the controlled buys appeared to be heroin, rather than simply stating they were heroin. However, the failure to discuss testing did not imply testing had taken place and instead implied the substances were identified through alternative means, such as appearance or the circumstances in which they were obtained.

Officer Maynard did not make false or reckless statements when he identified the substances as heroin. This identification was reasonable based upon his training, experience and reliance on Detective Ford's confirmation.

Additionally, the circumstances surrounding the controlled buys also provided a reasonable basis for Officer Maynard's conclusions. While his belief was based upon circumstantial evidence rather than testing, this was sufficient for the issuance of a search warrant because it provided probable cause to believe that contraband would be found at Brown's apartment.

Accordingly, the Fayette Circuit Court properly denied Brown's motion to suppress because the search warrant was valid and we affirm Brown's conviction.

ALL CONCUR.

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