RENDERED: OCTOBER 7, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002055-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID "JACK" SEAY, JUDGE
ACTION NO. 14-CR-00006

BRITNEY HARPER — APPELLEE

AND NO. 2014-CA-002056-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID "JACK" SEAY, JUDGE
ACTION NO. 14-CR-00008

KATELIN BALLARD — APPELLEE

AND NO. 2014-CA-002057-MR

COMMONWEALTH OF KENTUCKY APPELLANT

v. APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID "JACK" SEAY, JUDGE
ACTION NO. 14-CR-00010

NEIL DENNISON APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND STUMBO, JUDGES.

D. LAMBERT, JUDGE: The Commonwealth appeals to this Court from an order by the Hart Circuit Court, which granted the motion to suppress evidence filed by the Appellee, Neil Dennison. The other Appellees, Britney Harper and Katelin Ballard, were Dennison's co-defendants below, and joined in the motion. This Court will address the three appeals together, as they each arise from the same order by the trial court and demand the same result. For the reasons discussed herein, this Court reverses the trial court's ruling.

I. FACTUAL AND PROCEDURAL HISTORY

On December 17, 2013, Hart County Deputy Sheriffs Caleb Butler and Jeff Wilson, acting on a burglary complaint, searched a shed located near Dennison's residence. Within the shed, they found a red cooler containing components commonly used in the manufacture of methamphetamine. The deputies decided to "stake out" the shed and wait for the owner of the cooler to return for it. Butler, nearing the end of his shift, left Wilson to watch the shed alone. After a period of time, Wilson left the shed to eat and warm up at a nearby gas station.

Upon his return, Wilson discovered the cooler was no longer there. He suspected someone from the residence had retrieved it, and confirmed those suspicions sometime later when he observed an unidentified individual carrying the cooler as this individual exited the residence. Wilson also noted the presence of a strong odor associated with manufacturing methamphetamine.

Wilson then called Hart County Sheriff Boston Hensley for assistance. Wilson watched the back door of the residence while Hensley approached the front of the residence to perform a "knock-and-talk." As Hensley spoke with Dennison, who had answered the door, an unidentified individual ran out the back door, only to immediately retreat back into the residence when Wilson made his presence known.

At that point, Wilson contacted Butler about obtaining a search warrant for the residence while he and Hensley secured the occupants of the residence. Butler contacted Assistant Hart County Attorney, Lew Crawford, to

prepare the documents necessary for obtaining a warrant. Crawford did so, and then faxed those documents to Butler. Butler, in turn, faxed the documents to a District Judge, and then called the judge to go over the substance of the affidavit. The judge then swore Butler in over the telephone; Butler signed the affidavit and faxed the signed version to the judge. The judge then signed both the affidavit and the warrant, and then faxed the warrant back to Butler.

With warrant in hand, Butler went back to the Dennison residence and the three officers executed the search. Within the residence, the officers located meth-making materials, and consequently arrested every occupant, the Appellees. The Grand Jury returned indictments for all three Appellees (plus another co-defendant who is not party to any appeal), for the offense of manufacturing methamphetamine.

Dennison filed a motion to suppress the fruit of the search on July 1, 2014. Though he initially argued that the deputies were on the property illegally, during the hearing the trial court expressed concerns about the issuance of the warrant. Dennison filed a second motion to suppress on July 10, 2014, changing his position to emphasize the argument that the warrant was not properly issued pursuant to Rules 13.10 and 2.02 of the Kentucky Rules of Criminal Procedure ("RCr"). Harper and Ballard joined this motion. Following a hearing, the trial court granted the motion.

The Commonwealth filed a motion to alter, amend, or vacate the order suppressing the evidence. During the hearings on said motion, the trial court

questioned the whereabouts of the copy of the warrant bearing the District Judge's original signature, as it had not been filed of record. Nor had the copy of the warrant actually carried to the scene by Butler at the time of its execution found its way into the record. The trial court denied the motion to alter, amend, or vacate, concluding that the actions of the officers and the District Judge had "complete[ly] disregard[ed]" RCr 13.10 in such a way that amounted to an "abandonment of the process outlined by the rule." The Commonwealth's appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

The standard of review for a trial court's ruling on a motion to suppress evidence involves a two-step review. First, the reviewing court must determine whether the trial court's factual findings were supported by substantial evidence. *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky. 2004). If they were, the factual findings were conclusive, and the reviewing court must then determine whether the trial court properly applied the law to those findings under a *de novo* standard. *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2003).

Neither party contests the trial court's findings of fact; therefore, this Court's analysis will focus on the second prong of the test, and review the trial court's application of the law to the facts *de novo* to determine whether the decision was correct as a matter of law. *Drake v. Commonwealth*, 222 S.W.3d 254, 256 (Ky.App. 2007).

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING THE EVIDENCE OBTAINED IN THE SEARCH

This appeal hinges on an interpretation and application of RCr 13.10 and RCr 2.02. Rule 13.10 states as follows:

> (1) Upon affidavit sufficient under Section 10 of the Kentucky Constitution and sworn to before an officer authorized to administer oaths as provided in Rule 2.02 for the swearing of complaints, a search warrant may be issued by a judge or other officer authorized by statute to issue search warrants.
>
> (2) A copy of the search warrant and supporting affidavit shall be retained by the issuing officer and filed by such officer with the clerk of the court to which the warrant is returnable.
>
> (3) The officer executing a search warrant shall make return thereof to the appropriate court within a reasonable time of its execution. The return shall show the date and hour of service.

Rule 2.02 provides:

> The complaint is a written statement of the essential facts constituting the offense charged. It shall be made under oath and signed by the complaining party before a judge or a person who (a) is legally empowered to administer oaths and (b) has been authorized to administer such oaths to a complaining party by written order of a judge for the county having venue of the offense charged.

The Commonwealth's position on appeal is that the procedure followed by Butler and the District Judge in authorizing the warrant was proper, and, even if the rules of procedure were violated, the violation was not deliberate and therefore does not merit suppression of the evidence.

The Appellees urge a literal reading of the phrase "…before an officer authorized to administer oaths…" from RCr 13.10(1), and the phrase "…before a judge…" from RCr 2.02. They advocate requiring the physical presence of both the officer and the issuing judge when authorizing a warrant. Expounding the argument, the Appellees contend that the required oath was not properly administered, and for that reason the warrant was not properly issued. The trial court, too, adopted this position.

The trial court relied primarily on *Copley v. Commonwealth*, 361 S.W.3d 902 (Ky. 2012). In that case, a warrant was issued after the affiant officer was sworn in by an individual who had no power to administer oaths. The Supreme Court noted that "[s]uppression of evidence pursuant to the exclusionary rule applies only to searches that were carried out in violation of an individual's constitutional rights." *Id.* at 905. The Court also stated two instances where such violation of a procedural rule rises to the level of a constitutional violation: 1) a situation where the accused was prejudiced in that the search might not have occurred, or would not have been so abusive but for the violation of the rule, or 2) a situation where there is evidence of a deliberate disregard of a provision of the rule. *Id.* at 907. The Supreme Court noted that it employed the phrasing "deliberate disregard" as a substitute for the phrase "bad faith" to avoid confusion with the analysis involved in the good faith exception to the warrant requirement. *Id.* at n. 5.

The Commonwealth argues that no prejudice occurred here, as the circumstances easily gave rise to a finding of probable cause. The Commonwealth instead focuses its arguments on the second option of the *Copley* analysis, as do the Appellees.

Regarding RCr 13.10(1) and 2.02, the Commonwealth offers the argument that the language in both rules concerning an affiant being "sworn before" an officer or judge need not be read literally, but offers no supporting authority. The Appellees, on the other hand, cited the analysis of the rules of statutory construction described in *Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky. 2006), which included that "[r]esort must be had first to the words, which are decisive if they are clear. The words of the statute are to be given their usual, ordinary, and everyday meaning." *Id.* at 648-49 (quoting *Gateway Constr. Co. v. Wallbaum*, 356 S.W.2d 247 (Ky. 1962)). The Commonwealth's argument rings hollow here, where the plain meaning of the wording of the rule is clear, and requires a literal reading. We agree with the trial court: the telephonic swearing of an oath is not "before" the officer empowered to administer such oaths and is therefore a violation of both RCr 13.10(1) and 2.02.

The Commonwealth also attempts to minimize the obvious violations of 13.10(2) and (3). While not denying the absence of the documents from the record, the Commonwealth argues such violations should be excused. The Commonwealth's most persuasive argument is that the rules were not *deliberately* violated; rather the violations were the result of negligence. The Commonwealth

argues that Butler, who is relatively new to law enforcement,[1] had only taken out five warrants prior to the one at issue in this case, and relied on the advice of more experienced officers that obtaining warrants by telephone was acceptable.

The trial court found the violations of all three subsections of RCr 13.10 amounted to a deliberate disregard of the rule. This Court agrees with the trial court that all three provisions were violated, but cannot adopt the position of the trial court that the record reflects a bad faith effort by the officer, the assistant county attorney, or the District Judge, to violate the rule. The violations here appear to be the consequence of inadequate training of an officer with limited experience in the proper procedures involved in obtaining warrants. Further, the trial court's ruling evinces an improper assumption that because all three subsections of RCr 13.10 were violated, the parties must have intended the violation. This Court's examination of the record does not lead to the same conclusion.

While this Court cannot overemphasize the conclusion that the practice of telephonic swearing of oaths in the context of applying for search warrants is improper, we likewise cannot conclude that this procedural error merits suppression of the evidence yielded by the search pursuant to that warrant, which was supported by probable cause. The trial court relied on an assumption with no basis in the evidence in issuing its finding that, as a matter of law, the actions of law enforcement, the office of the county attorney, and the District Judge,

[1] The parties indicate Butler had been employed by the Hart County Sheriff's Office for approximately three years on the night of the search

amounted to a deliberate disregard of the procedural rules. Given that the conclusion based on that assumption was crucial to the trial court's ruling, this Court must conclude the trial court acted in error in so ruling.

III. CONCLUSION

This Court, having concluded that the trial court misapplied established authority in its application of the law to the facts presented, must hereby REVERSE the ruling and REMAND for further proceedings consistent herewith.

KRAMER, CHIEF JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

KRAMER, CHIEF JUDGE, CONCURRING: I concur with the result of the majority's opinion to reverse and remand this action because the error in complying with the criminal rules was not deliberate and, therefore, does not merit suppression of the evidence. I write separately because I believe that telephonic swearing of oaths, in the context of applying for search warrants, is not necessarily improper, although not expressly permissible in the Commonwealth at this time. Indeed, in his concurrence in *Copley*, Justice Cunningham wrote:

> In this day of staggering technological advances in communications—both written and oral—there should be little problem in providing full time judicial coverage. E-warrants, smart phones, and fax machines now make immediate access to a judge or commissioner much

> easier. A judge or commissioner neither has to leave his or her house, nor wait on the arrival of the police.

Copley, 361 S.W.3d at 908 (Cunningham, J., concurring).

While the Kentucky Rules of Criminal Procedure do not take into account more modern technology, the Federal Rules of Criminal Procedure allow for the issuance of search warrants based upon information conveyed telephonically or through other electronic means. FED. R. CRIM. P. 4.1; FED. R. CRIM. P. 41(d)(3). Likewise, Federal courts have consistently held that oaths taken over the telephone are not invalid. *United States v. Shorter*, 600 F.2d 585, 588-89 (6th Cir. 1979); *United States v. Turner*, 558 F.2d 46, 50 (2d Cir. 1977); *see also* WAYNE R. LAFAVE, 2 SEARCH AND SEIZURE § 4.3(c) (5th ed. 2015) (discussing, in detail, the constitutionality of oral search warrants). In fact, Federal Rule 4.1 explicitly lays out the necessary procedure for taking testimony under oath by telephone or other reliable electronic means. *See* FED. R. CRIM. P. 4.1(b)(1).

Kentucky precedent establishes that, "[s]ection 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment." *Colbert v. Commonwealth*, 43 S.W.3d 777, 780 (Ky. 2001) (citing *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996). Following this logic, it would seem that the act of taking a telephonic oath should not violate a defendant's constitutional protections under section 10 of the Kentucky Constitution. As Justice Cunningham alluded to in *Copley*, modern technology makes acquiring search warrants from a distance, through telephonic sworn

testimony or other reliable electronic means, consistent with the requirements of the Fourth Amendment as well as section 10 of the Kentucky Constitution.

Because the result that has been reached in this opinion is consistent with established authority, I concur in result.

STUMBO, JUDGE, DISSENTS AND WILL NOT FILE A SEPARATE OPINION.

BRIEF FOR APPELLANT:

Jack Conway
Attorney General of Kentucky
Frankfort, KY

Joseph Guinan Ballard
Bardstown, KY

BRIEF FOR APPELLEE NEIL DENNISON:

Matthew T. Roberts
Munfordville, KY

BRIEF FOR APPELLEE BRITNEY HARPER:

Emily Holt Rhorer
Assistant Public Advocate
Frankfort, Kentucky

NO BRIEF FILED FOR APPELLEE, KATELIN BALLARD.