

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002068-MR

JOE S. WATKINS

APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 10-CR-00152

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JONES, AND NICKELL, JUDGES.

JONES, JUDGE: The Appellant, Joe Watkins, brings this appeal to challenge his conviction on several counts of possession of matter portraying a sexual performance by a minor. Watkins's conviction and sentence were entered by the Bourbon Circuit Court after Watkins agreed to a conditional guilty plea. Under the

terms of the agreement, Watkins pled guilty subject to his right to appeal the circuit court's denial of his motion to suppress.¹ After careful review, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 8, 2010, Officer Shaun Moore of the City of Paris Police Department and Detective Jeff Asbury of the Bourbon County Sheriff's Office used an undercover informant to purchase narcotics from Watkins. In exchange for \$75.00 in cash, Watkins gave the informant three pills. Testing by poison control subsequently identified the pills as Percocet.

Six days later, on October 14, 2010, Officer Moore and Detective Asbury, attempted to coordinate a second buy using the same informant. This second buy never took place. According to the informant, Watkins observed her recording device after she entered his car. Thereafter, the informant tried to escape the situation by fleeing to her car. Watkins gave chase and was able to gain entry into the informant's car. Watkins then tackled the informant and tried to remove the recording device from her body. The informant eventually extricated herself from the car and ran into a nearby market asking for help; thus, ending her encounter with Watkins.

Later that same evening, Officer Moore completed an affidavit requesting issuance of a warrant to search Watkins's businesses (The New Leaf Florist and Chicken Ranch), residence and vehicle. The affidavit detailed the

¹ Watkins was also convicted on several counts involving drug trafficking. Watkins entered a non-conditional guilty plea with respect to the drug-related counts. As such, those counts are not part of this appeal. Our discussion of the drug-related counts is limited to those facts necessary to explain the procedural and factual background surrounding the convictions being appealed.

informant's buy on October 8th and failed attempted buy earlier in the day. The affidavit further indicated that approximately three days prior, the informant reported seeing a video on Watkins's computer of a young child (six to eight years of age) being sexually abused by an adult male.

A Bourbon District Court Judge signed the warrant at 7:02 p.m. on the evening of October 14, 2010. The warrant provides that the officers shall be permitted to search and seize the following property:

Prescription narcotics, or any other substance in violation of the Controlled Substance Chapter (KRS 218A); Any computer or computer record involving any substance in violation of the Controlled Substance Chapter (KRS 219A); All weapons and money; All records detailing net worth, occupancy, residency, ownership. Or evidence of money laundering; Any and all items related to or derived from the sale, use, transfer, storage, shipping. Or handling any substance in violation of the Controlled Substance Chapter (KRS 218A); and Any and all items in violation of the Drug Paraphernalia Offenses (KRS 218A.500). Any and all electronic media and reading devices such as computers diskettes, tapes monitors, jump drives, and printers. Any and all evidence of crimes being committed or will be committed.

(R. at 41).

Several computers and other items were seized from Watkins when officers executed the search warrant. Watkins was then arrested and placed in the Bourbon County Detention Center. The investigating officers arranged for all of Watkins's calls to be monitored. While detained, Watkins talked to his brother,

Karl. During their conversation, Karl told Watkins that law enforcement had seized his computers, to which Watkins responded: "I'm dead, I'm done."

Even though police seized Watkins's computers and other electronic devices on October 14, 2010, they did not search them for images of child pornography at that time. Instead, on October 18, 2010, investigators requested a second warrant permitting the Cyber Crimes Branch Computer Forensics Lab located at the Office of the Attorney General to subject the items to an in-depth forensic examination for the following:

Images or visual depictions representing the exploitation of children. Digital storage media and the digital content . . . which can be accessed by computers to store or retrieve data or images of child pornography. . . .
Correspondence or other documents (whether digital or written) pertaining to the possession, receipt, collection, origin, manufacture or distribution of images involving the exploitation of children. Items of digital information that would tend to establish ownership or use of computers and Internet access equipment and ownership or use of any Internet service accounts and cellular digital networks to participate in the exchange, receipt, possession, collection or distribution of child pornography.

(R. at 44).

In support of the requested warrant, Detective Asbury averred that the confidential informant provided information that a few days before Watkins showed her a video containing images of a child, possibly as young as six, engaged in a sexual act with an adult male. Detective Asbury noted that computers and other electronic devices were obtained in the course of the narcotics investigation,

including several flash drives hidden in a stairwell. Detective Asbury further averred that Watkins became distraught when his brother informed him that police had his computers. Based on these facts, Detective Asbury stated that he believed a comprehensive search of the computers would yield evidence related showing Watkins had illegal child pornography materials in his possession. This affidavit was sworn before Jeff Lizer, a police officer. The warrant was signed and issued by a district judge that same day.

Thereafter, a forensic examination was conducted on Watkins's electronic devices. The examination revealed between four thousand to five thousand images and videos of possible child pornography. As a result, Watkins was indicted on several counts of possession of matter portraying a sexual performance by a minor.

Prior to trial, Watkins moved the trial court to suppress evidence of the child pornography located on his computers on the basis that the October 14, 2010, and October 18, 2010, warrants were constitutionally invalid. After the trial court denied Watkins's challenges to the warrants, he entered a conditional guilty plea to the child pornography charges. This appeal followed.

II. ANALYSIS

The Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution require that persons, places and things to be searched or seized must be reasonably identified. *Johantgen v. Commonwealth*, 571 S.W.2d 110, 111–12 (Ky. App. 1978). These constitutional provisions were

designed to avoid the evils of indiscriminate general searches that needlessly invade privacy rights. *Commonwealth v. Appleby*, 586 S.W.2d 266, 269 (Ky. App. 1978). “The controlling constitutional requirement is specificity of description.” *Johantgen*, 571 S.W.2d at 112. When specificity is observed, it avoids “cloaking the police with selective discretion in determining what may be searched[.]” *Commonwealth v. Smith*, 898 S.W.2d 496, 500 (Ky. App. 1995). A search warrant which fails to contain a reasonably specific description of the thing to be searched or seized is constitutionally defective. *Crum v. Commonwealth*, 223 S.W.3d 109, 112 (Ky. 2007).

Watkins’s first argument relates to the validity of the October 14th warrant. Relying on *Guth v. Commonwealth*, 29 S.W.3d 809 (Ky. App. 2000), Watkins argues that the evidence must be suppressed because no facts were set out in the affidavit connecting Watkins’s suspected criminal activity to his home or business or specifying the locations of his encounters with the confidential informant. In *Guth*, a search warrant was issued for Guth's residence based upon an affidavit that stated Guth sold cocaine to a man for \$200 “in a controlled environment[.]” *Id.* at 810. This court held that the affidavit was invalid on its face since it “neither alleged that the controlled environment was Guth's residence nor did it allege any connection between the place where the transaction took place and the residence.” *Id.* at 811. In fact, the drug transaction took place in a motel parking lot some four or five miles from Guth's residence. *Id.* at 810.

Subsequent panels of our Court have rejected *Guth* in circumstances similar to the present. Most recently in *Elders v. Commonwealth*, 395 S.W.3d 495, 497 (Ky. App. 2012), we held that where it was alleged that the incriminating evidence might be located on a video camera, it was reasonable to assume that the camera might be located at the defendant's residence. Likewise, in *Beckam v. Commonwealth*, 284 S.W.3d 547 (Ky. App. 2009), we held that evidence regarding the condition of two rental vehicles returned by defendant was sufficient to support an inference that defendant might have been involved in drug trafficking, as required to establish probable cause for issuance of search warrant, and that it was reasonable to assume that evidence of the drug trafficking could be found in defendant's residence.

Our holdings in *Elders* and *Beckman*, are consistent with the approach taken by the Kentucky Supreme Court in *Moore v. Commonwealth*, 159 S.W.3d 325 (Ky. 2005).² In *Moore*, law enforcement received evidence regarding a fraudulent bank account set up by the defendant that indicated he might have been involved in illegal counterfeiting activity. Based on this information, the investigators obtained a warrant allowing them to search Moore's vehicle and residence and seize various items, including computers. Like Watkins, Moore argued that the warrant was invalid because the supporting affidavit did not include facts "connecting the Defendant's residence to his alleged activities." *Id.* at 329.

²The Supreme Court of Kentucky cited this portion of *Beckam* with approval in an unpublished decision, *Dumas v. Commonwealth*, No. 2010-SC-000378-MR, 2011 WL 2112560, at *4 (Ky. May 19, 2011). The Court's analysis indicates that it believes we correctly applied *Moore*.

Our Supreme Court rejected this argument. It concluded that based on the facts alleged, it was reasonable to assume that Moore was engaging in the counterfeiting activity in the “secrecy” of his home. Likewise, it was reasonable to infer that he may have used his computer in furtherance of his crimes.

Having carefully reviewed the applicable legal authorities, we must conclude that any requirement in *Guth* for the requesting officer to include an *explicit* statement in the affidavit connecting the place to be searched with the alleged criminal has been effectively superseded by *Moore*. It is clear to us from reviewing *Moore* that there is not a requirement for the affidavit to explicitly explain the connection between the location of the search and the alleged criminal activity. Under certain circumstances, the issuing judge is permitted to infer a nexus between a crime and the location of evidence of that crime.

In this case, while the affidavit the investigator used to support the October 14th warrant was primarily focused on Watkins’s alleged drug crimes, it also included evidence that the informant had viewed child pornography on Watkins’s computer. The informant’s description of the material was sufficiently detailed to indicate that it had some reliable basis in fact, *i.e.*, the affidavit indicates that the informant described it as material showing “a 6 to 8-year old child being sexually abused by an adult male.” *See Lovett v. Commonwealth*, 103 S.W.3d 72, 78 (Ky. 2003) (“The level of detail provided by the confidential informant in this case, in addition to his statement of first-hand observation, lends significant reliability to the information he provided.”). Likewise, the affidavit indicates that

the informant had previously been determined to be credible in that the pills she stated that she purchased from Watkins in the past did test positive as being narcotics. Based on the facts contained in the affidavit, it was entirely reasonable to assume that Watkins was engaged in criminal drug activity and possessed illegal child pornography. It was likewise reasonable to infer that evidence of such crimes could be located in Watkins's residence and on his electronic devices contained therein.

In sum, we believe that the facts alleged in the October 14th affidavit were sufficient to create a reasonable inference that child pornography would be located on the computers and other electronic storage devices located and seized during the search of Watkins's home and businesses. That being the case, we believe that it was unnecessary for investigators to obtain another warrant allowing them to search the contents of those devices for pornographic images of children. *See Hause v. Commonwealth*, 83 S.W.3d 1, 14 (Ky. App. 2001).

Even though no additional warrant was required, investigators did take the additional step of securing a second warrant on October 18th allowing them to search the contents of the electronic devices they seized from Watkins. In addition to the informant's prior statement, this affidavit also included a statement that the officer had listened to a recording made of a jail conversation between Watkins and his brother. The officer indicated that Watkins became distraught upon learning that investigators had seized his computers. The trial court reviewed

the four corners of the October 18th affidavit and found that the warrant was based on probable cause to support the search of the digital media. We agree.

Finally, Watkins argues that the search warrant was invalid because the affidavit in support thereof was not sworn to before a magistrate or officer authorized by the court as required by Kentucky Rule of Criminal Procedure 13.10.

In *Copley v. Commonwealth*, 361 S.W.3d 902 (Ky. 2012), our Supreme Court held that a technical deficiency in a search warrant, based upon the notary's lack of judicial authorization to administer oaths, did not violate defendant's constitutional rights so as to require suppression. Under *Copley*, the court must consider whether the procedural rule was violated in good faith and whether the violation prejudiced the defendant. *Id.* While Officer Lizer was not a proper person for the affidavit to be sworn before, any error in this regard is technical only. There is no evidence that the officers acted in bad faith or that the failure to properly adhere to this portion of the rule actually prejudiced Watkins. As such, suppression was not required.

III. CONCLUSION

For the foregoing reasons, the judgement of the Bourbon Circuit Court is AFFIRMED.

ALL CONCUR.

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