

RENDERED: SEPTEMBER 9, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001712-MR

JERRY W. EDINGTON JR.

APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE JR., JUDGE
ACTION NO. 15-CR-00223-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

D. LAMBERT, JUDGE: Jerry W. Edington Jr. appeals from a Madison Circuit Court judgment and the sentence imposed as the result of his entry of a conditional guilty plea. Edington challenges the trial court's denial of his suppression motion.

I. FACTUAL AND PROCEDURAL HISTORY

Edington argues on appeal that the affidavit included as part of the application for a warrant to search his residence contained false or reckless statements and therefore lacked sufficient support for a finding of probable cause. He made similar arguments in a suppression motion, which, following a hearing, the trial court denied.

At the hearing, Berea Police Detective Danny McGuire, assigned to the High Intensity Drug Trafficking Area (“HIDTA”) Task Force, testified that law enforcement had received numerous complaints alleging Edington sold large amounts of heroin from his residence. According to McGuire, the police believed Edington’s source of supply was a black man from the Detroit area.

On February 24, 2015, McGuire arranged for a confidential informant to make a controlled buy from Edington at his residence. At that time Edington resided in the 400 block of Charles White Road in Richmond, Kentucky. The purchase attempt netted just under two grams of heroin, and a video recording captured the transaction.

McGuire began to draft an affidavit for a search warrant containing a description of the February 24, 2015 controlled buy. The affidavit in support of the search warrant described the first controlled buy as follows:

On 02-24-2015 the affiant utilized a confidential informant 0215DM006 to purchase heroin from inside his residence in the 400 block of Charles White road Richmond KY. This residence is located at LAT: 37 degrees 49’43 north LON: 84 degrees 27’22 west. The

confidential informant stated that Edington's source of supply of heroin and prescription pills was a black male subject from the Detroit, Michigan area. The confidential informant also stated that the black male subject sometimes stays at Edington's residence. After the CI had been briefed on how the heroin purchase would be conducted the affiant searched the CI and issued the CI buy money for the heroin purchase. The affiant fitted the CI with a video camera so the transaction could be monitored and recorded. The affiant then drove myself and the CI to Edington's residence and observed the CI enter the residence. A few minutes later the affiant observed the CI exit the residence and get back into the vehicle with the affiant. The CI was debriefed and handed over the heroin he had just purchased from Edington to the affiant. The affiant then searched the CI again.

McGuire also planned to arrange a second controlled buy from Edington at the same address on March 2, 2015. He even went so far as to pre-draft a description of that controlled buy for his warrant application affidavit:

On 03-02-2015 the affiant utilized a confidential informant to purchase heroin from Edington from inside his residence again in the 400 block of Charles White road Richmond KY. This residence is located at LAT: 37 degrees 49'43 north LON: 84 degrees 27'22 west. After the CI had been briefed on how the heroin purchase would be conducted the affiant searched the CI and issued the CI buy money for the heroin purchase. The affiant then fitted the CI with a video camera so the transaction could be monitored and recorded. The affiant then drove myself and the CI to Edington's residence and observed the CI enter the residence. A few minutes later the affiant observed the CI exit the residence and get back into the vehicle with the affiant. The CI was debriefed and handed over the heroin he had just purchased from Edington to the affiant. The affiant then searched the CI again.

The informant became unavailable between the time of the drafting of the affidavit and the application for the warrant. Thus, the second controlled buy operation never occurred.

McGuire testified at the hearing that he drafted this portion of the affidavit before the actual events described therein because police were always “in a pinch to get things processed in a timely manner.” McGuire failed to remove the description of the second buy from the affidavit.

On April 3, 2015, McGuire conducted a traffic stop of Edington’s vehicle, in which Edington rode as a passenger. Edington consented to a search of the vehicle and his person. This search yielded approximately \$4,000 in cash in the vehicle and in Edington’s wallet. The search also revealed an empty pill bottle in the vehicle and several suboxone pills hidden in Edington’s underwear. Edington told McGuire that he had just delivered twenty grams of heroin to another individual, and further divulged that his supplier was located at his residence at that moment, with more heroin and firearms. Edington identified his residence as 1055 Mule Shed Lane.

McGuire returned to his office to prepare a petition for a search warrant of Edington’s residence at 1055 Mule Shed Lane. He used the affidavit he had prepared earlier, which included the descriptions of the February 24, 2015, controlled buy, as well as the account of the March 2nd buy which never occurred. He added information obtained from the traffic stop.

The warrant was issued by a judge and executed on Edington's Mule Shed Lane residence. The police collected several baggies of suspected heroin and items of drug paraphernalia. Edington was charged with first-degree trafficking in a controlled substance, more than two grams of heroin; possession of drug paraphernalia; and second-degree possession of a controlled substance.

After the trial court denied Edington's suppression motion, he entered a conditional guilty plea to charges of first-degree trafficking in a controlled substance, more than two grams of heroin; first-degree trafficking under two grams of heroin; and being a felon in possession of a firearm. He received a total sentence of seven years. Edington, having reserved the right to do so, filed the instant appeal.

II. ANALYSIS

A. STANDARD OF REVIEW

“It is well established that ‘[s]earch warrants must be supported by probable cause to satisfy the dictates of the Fourth Amendment.’” *Minks v. Commonwealth*, 427 S.W.3d 802, 809 (Ky. 2014) (citations omitted). In assessing whether probable cause exists to issue a warrant, Kentucky has adopted the “totality of the circumstances” standard set forth in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). See *Beemer v. Commonwealth*, 665 S.W.2d 912, 913 (Ky. 1984). Thus, “the trial court judge faced with a motion to suppress evidence obtained pursuant to a search warrant should apply the *Gates* standard, and determine whether under the ‘totality of the circumstances’ presented

within the four corners of the affidavit, a warrant-issuing judge had a substantial basis for concluding that probable cause existed.” *Commonwealth v. Pride*, 302 S.W.3d 43, 49 (Ky. 2010).

To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause. . . . 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.

Commonwealth v. Smith, 898 S.W.2d 496, 503 (Ky.App. 1995), as modified (May 12, 1995); *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

**B. THE TRIAL COURT DID NOT ERR IN CONCLUDING THE
AFFIDAVIT STATED SUFFICIENT INFORMATION FOR A
FINDING OF PROBABLE CAUSE**

Edington argues that the warrant contained false or reckless statements and consequently did not support a finding of probable cause to support the search warrant. He alleges two deficiencies: first, that the affidavit included a description of a controlled drug buy that never took place; and secondly, the affidavit did not identify a reason to search 1055 Mule Shed Lane.

The first page of the affidavit provided as the address for which the warrant was sought 1055 Mule Shed Lane in Richmond. It described the residence

as being occupied by Edington, and also provided physical descriptions of both Edington and “Mike,” his supplier. McGuire acknowledged at the suppression hearing that he failed to explain in the affidavit that Edington had moved from Charles White Road to Mule Shed Lane.

The affidavit indisputably contained false statements: the description of the controlled buy at Edington’s former residence on March 2, 2015, which never occurred. The trial court found that McGuire had not intentionally misled the court or recklessly disregarded the truth when he mistakenly included this material. This finding is supported by McGuire’s testimony that his department was understaffed and that he operated under significant time constraints.

Moreover, *Smith* places the onus on Edington to also show that the affidavit, purged of this material, would not support a finding of probable cause to issue a search warrant for the premises at 1055 Mule Shed Lane. “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).

Even ignoring the information in the affidavit concerning the fictitious account of the March 2nd purchase, the affidavit contains a description of the controlled buy which did occur at Edington’s previous address on February 24, 2015, and a lengthy description of the April 3, 2015, traffic stop. The description of the traffic stop also includes Edington’s statements to police that there was a black male subject known as “Mike” at his residence at 1055 Mule Shed Lane.

Edington noted that Mike was his source of supply for heroin, that Mike had heroin inside the residence, and that there were firearms inside the residence.

Through the affidavit, the warrant-issuing magistrate possessed knowledge that on a previous occasion, Edington had sold drugs from his home, (albeit at a different address), and that about a month later, when he was pulled over by police, he was not only in possession of controlled substances and a large amount of currency, he also admitted that he had heroin and firearms in his current residence, and that his drug supplier was at the residence as well. This provided ample cause to suspect that contraband would be present at his current residence.

Edington urges an overly strict interpretation of the affidavit. He contends the events described in the affidavits at his address at Mule Shed Lane, had an insufficient connection to his current address at 1055 Mule Shed Lane. However, the section describing the traffic stop plainly states that Edington told police that heroin, firearms, and his supplier, were all located at his current residence.

However sloppy the inclusion in the affidavit of the fictitious description of the second controlled buy may be, our law simply does not require a search warrant to be voided and the fruits of the search to be excluded when, as in this case, the remainder of the affidavit supports a finding of probable cause to search the premises.

III. CONCLUSION

This Court having reviewed the record and finding no error, the Madison Circuit Court's denial of Edington's motion to suppress, and its final judgment, are hereby AFFIRMED.

ALL CONCUR.

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