ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION I

CACR 06-1204

LESTER JOE HILL
APPELLANT

October 31, 2007

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT
[NO. CR-2005-1178]

V.

HONORABLE J. MICHAEL FITZHUGH, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant, Lester Joe Hill, was charged with one count of kidnapping and two counts of rape. A jury found appellant guilty as charged, and he was sentenced to a term of ten years' imprisonment for kidnapping and seventeen years' imprisonment for each count of rape, all to run consecutively. On appeal, appellant challenges the trial court's denial of his motion to suppress evidence found in his home pursuant to a search warrant, arguing that the warrant was defective because the affiant omitted relevant information that would render a lack of probable cause. We find that this argument was abandoned by appellant below, and we therefore affirm.

Appellant was charged with kidnapping and two counts of rape in violation of Arkansas Code Annotated sections 5-11-102 and 5-14-103, respectively. Appellant was accused of kidnapping the victim at knifepoint from the Pic-N-Tote car wash in Fort Smith and raping her on the night of September 23, 2005. Prior to the trial on the matter, appellant filed a motion to suppress items seized by the Fort Smith Police Department, arguing that they were illegally obtained.

A suppression hearing was held on March 16, 2006, at which the testimony of Detective Michael McCoy was presented by the State. McCoy testified that he participated in the investigation by obtaining a statement from the victim at the police station, obtaining a surveillance video from the car wash, and speaking with the car wash managers about a possible suspect identification. As part of her statement, the victim told McCoy that her attacker had a brown-handled knife. McCoy testified that he showed the victim two different photographic line-ups, from which she did not identify her attacker. After obtaining the name of appellant, McCoy assembled a third photographic line-up, from which the victim identified appellant as her attacker. McCoy and other officers then set up surveillance at appellant's home, conducted a traffic stop after he left his home in his truck, and searched the truck incident to the arrest. McCoy testified that the truck matched the truck seen on the surveillance video, and that it was maroon in color with decals that spelled "VIPER" along the side. Pursuant to the search of the truck, the police found a knife with a black handle.

McCoy explained that after the arrest, appellant was read his rights and signed a

Miranda rights form, acknowledging that he understood his rights. Appellant was then questioned by the police and admitted to sexual contact with the victim, which he claimed was consensual. Appellant later asked for an attorney and the interview was concluded. The next day, McCoy obtained a search warrant for appellant's home and provided the information in the supporting affidavit. During the subsequent search, officers found a brown-handled knife in appellant's closet.

On cross-examination, McCoy did not recall whether the discrepancy between the color of the knife found in appellant's truck and the color of the knife identified by the victim was mentioned in the affidavit for the search warrant. Appellant's counsel then argued to the court that the discrepancy should have been brought to the attention of the court to assist in its determination of whether there was probable cause to issue the search warrant. The court responded by noting that the affidavit did not mention the knives at all, so not addressing the color of the knives was not a discrepancy, as the court only looked to the four corners of the affidavit in making its determination. The court concluded by noting that it "is a novel argument but I don't think it has got much merit." Appellant's counsel then concluded his cross-examination of McCoy.

After the State had presented its closing argument, the following colloquy took place:

BY [APPELLANT'S COUNSEL]: Well, Your Honor, as much as I hate to admit it, [the State] is citing the correct law to the Court. You mentioned about looking at the four corners of the affidavit before issuing the search warrant. My concern was about the discrepancy on the colors of the knife and things like that.

I believe that was probably done correctly and I probably don't have grounds at this point to try and challenge any further than what I have done.

BY THE COURT: All right. Well, then, your motion to suppress the evidence on the basis of the testimony of Detective McCoy, your arguments, and the law which both of you are familiar with, and I appreciate the candor of Mr. Dunagin on what the law is and his knowledge of it *and agreement with it*. So, your motion to suppress is going to be denied.

(Emphasis added.) A jury trial was held on July 12, 2006, and appellant was found guilty as charged and received a total of forty-four years in the Arkansas Department of Correction. This appeal followed.

On appeal, appellant again argues that the motion to suppress should have been granted because the affiant, Officer McCoy, had direct knowledge of the discrepancies regarding the knives and intentionally and knowingly omitted that information. Appellant contends that if the discrepancy was added to the affidavit, it would render a lack of probable cause for the search warrant. We do not reach the merits of appellant's argument, however, because this argument was abandoned. At the suppression hearing, appellant's counsel conceded that the State was correct in its recitation of the law and the warrant was obtained correctly. The court, citing the applicable law and noting appellant's agreement with it, then denied the motion to suppress. We hold that appellant's agreement with the ruling below constituted an abandonment of his motion to suppress and cannot now be revived on appeal. *See Eastin v. State*, ___ Ark. ___, ___ S.W.3d ___ (May 10, 2007) (holding that motion to suppress was abandoned when defense counsel told the court he could not proceed without knowing the

identity of a confidential informant). Moreover, an appellant cannot agree with a trial court's ruling and then attack it on appeal. *Banks v. State*, 354 Ark. 404, 125 S.W.3d 147 (2003); *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003). Accordingly, we affirm.

Affirmed.

GLADWIN and BIRD, JJ., agree.