

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

CACR06-232

November 8, 2006

BRYANT HARRIS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE ARKANSAS
COUNTY CIRCUIT COURT

[CR-04-38]

HONORABLE DAVID G. HENRY,
JUDGE

AFFIRMED

Pursuant to Rule 24.3 of the Arkansas Rules of Criminal Procedure, appellant, Bryant Harris, entered a conditional plea of guilty to several drug-related offenses. In this appeal, he challenges the trial court's denial of his motion to suppress, contending in subpoints A) that there was no time reference included in the affidavit, either actual or inferable; B) that the affidavit did not sufficiently establish the reliability of the confidential informant; C) that there was not probable cause for the inclusion of certain designated items in the search warrant; and D) that because of the delay between the issuance and the execution of the search warrant, there was no longer probable cause when the search warrant was executed. In connection with his challenge to the trial court's

denial of his motion to suppress, appellant also raises two additional points of appeal: 1) that the trial court erred when it denied his motion for production of a *res gestae* witness, and 2) that the State “committed a *Brady* violation.” We affirm.

Standard of Review

Our supreme court set forth the appropriate standard of review in suppression cases in *George v. State*, 358 Ark. 269, 282-83, 189 S.W.3d 28, 36 (2004):

Our standard of review for a trial court’s decision to grant or deny a motion to suppress requires us to make an independent determination based on the totality of the circumstances, to review findings of historical facts for clear error, and to determine whether those facts give rise to reasonable suspicion or probable cause, while giving due weight to inferences drawn by the trial court. *See Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). Our review of the probable cause for the issuance of the warrant is confined to the information contained in the affidavit as that was the only information before the magistrate when he issued the warrant. *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985) (citing *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977)).

Supporting Affidavit

Rule 13.1(b) of the Arkansas Rules of Criminal Procedure sets out the requirements for the issuance of a warrant:

The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant’s reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish

the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

The issuing magistrate's task is simply to make a practical, common-sense decision of whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id.*

Here, the search warrant was issued on February 13, 2004, stating that there was reasonable cause to search appellant's residence. The finding of reasonable cause was based upon information provided by Deputy Bobby Webb concerning the sale of controlled substances, marijuana, to a confidential informant at the residence in question "within the last 72 hours." The purchase of marijuana was part of a controlled buy that was made under Deputy Webb's direction and supervision. It was Deputy Webb's affidavit/continuation of affidavit that supported the issuance of the search warrant. He stated that "there is now being concealed" controlled substances and associated items at the residence in question. Webb explained that he thoroughly searched the confidential informant and the vehicle used by the confidential informant prior to the controlled buy and that he found no controlled substance, contraband, or money in the vehicle or on the informant. He stated that the informant was provided with money for the marijuana

purchase, and that he observed the informant continuously as he/she traveled to and entered the residence in question until the informant returned to a designated meeting place. Webb stated that the only time the informant was out of his sight was while the informant was inside the residence for a “very brief time.” Webb explained that the informant delivered the controlled substance to Webb at the designated meeting place and that the informant was once again thoroughly searched, with no money or contraband found. Finally, Webb stated that a different reliable informant purchased crack cocaine from Harris under Webb’s direction at the corner of Cedar and Maxwell Streets on August 30, 2003. The search warrant was executed on March 2, 2004, returning numerous items that formed the basis for several drug-related charges against appellant.

At the hearing on appellant’s motion to suppress, Deputy Webb testified about his involvement with the issuance and execution of the search warrant. He also described the items that were discovered during the execution of the search warrant. During cross-examination, Deputy Webb explained that he placed a “listening device” on the confidential informant, that he heard information from the device, but that he did not record the statements. He said that he heard the informant purchase marijuana from appellant, but that he did not record the conversation because he was not going to prosecute that charge. He explained that he was only using the buy as probable cause for the search of the residence. Webb further testified that the controlled buy took place within seventy-two hours of the search warrant being issued, which was on February 13,

2004. He stated that he executed the warrant on March 2, and that it was returned on March 8.

Discussion

In his overall contention that the trial court erred in denying his motion to suppress, appellant argues under his first subpoint that the affidavit supporting the search warrant for appellant's house "stated no actual or inferable time frame." The argument has no merit.

In *Berta v. State*, 84 Ark. App. 335, 339, 140 S.W.3d 487, 490 (2004), this court explained:

In reviewing the trial court's denial of a motion to suppress evidence, we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). An affidavit for a search warrant must set forth facts and circumstances establishing probable cause to believe that things subject to seizure will be found in the place to be searched. *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001). Because a magistrate must know that at the time of the issuance of the warrant there is criminal activity or contraband where the search is to be conducted, a time reference must be included in the affidavit, and the time that is critical is the time during which the criminal activity or contraband was observed. *Heaslet v. State*, 77 Ark. App. 333, 74 S.W.3d 242 (2002). However, the absence of a reference to time in the affidavit will not render the warrant defective if we can look to the four corners of the affidavit and infer the time during which the observations were made. *Smith v. State*, 79 Ark. App. 79, 84 S.W.3d 59 (2002).

Here, the affidavit for search warrant is dated February 13, 2004, the same date that the search warrant was issued. Additionally, the affidavit provides that "there is now

being concealed ... controlled substances” and related items and that information gathered by a reliable confidential informant “led to the controlled purchase of marijuana from [102 North May DeWitt, Arkansas] within the last 72 hours.” We hold that the time-reference requirement was fully satisfied under these circumstances.

Under his second subpoint, appellant contends that the affidavit did not sufficiently establish the reliability of the confidential informant. The problem with this argument is that Webb’s affidavit was not based solely on information provided by the confidential informant. Rather, it was based more on Webb’s own personal observations during a controlled buy than anything that he was told by the confidential informant.

In *Fouse v. State*, 73 Ark. App. 134, 43 S.W.3d 158 (2001), we quoted pertinent portions of Rule 13.1(b), which provided that if an affidavit is based in whole or in part on hearsay, the affiant shall set forth particular facts bearing on the informant’s reliability and shall disclose, as far as practicable, the means by which the information was obtained.

We then explained:

A search warrant is flawed if there is no indicia of the reliability of the confidential informant. Furthermore, the conclusory statement, “reliable informant” is not sufficient to satisfy the indicia requirement. If, however, the affidavit when viewed as a whole provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure may be found in a particular location, the failure to establish the veracity of the informant is not fatal.

....

In this case, a number of sheriff’s deputies and task force agents confirmed the smell of ether originating from the residence after receiving reports that a methamphetamine lab was located at the residence. Additionally, members of the drug task force personally observed the counter-surveillance measures being

employed at the residence and aerial surveillance corroborated the presence of a large collection of automobiles. Finally, on the evening before applying for the warrant, members of the Drug Task Force entered property near the residence and could smell ether and hear the movement of large items. These personal observations of members of the Sheriff's office and the Drug Task Force provide confirmation of the information supplied by the confidential informants.

(Citations omitted.) *Fouse v. State*, 73 Ark. App. at 143, 43 S.W.3d at 164-65; *see also Haynes v. State*, 83 Ark. App. 314, 128 S.W.3d 33 (2003) (affidavit was found to be sufficient where police officer was involved and drug purchases made by confidential informants were controlled buys). Here, viewing Webb's affidavit as a whole, we conclude that it was not essential that the reliability of the confidential informant be established because the affidavit did not rely upon hearsay from the informant. Rather, Deputy Webb personally observed and reported the activities associated with the controlled buys.

For his third subpoint, appellant contends that there was not probable cause for inclusion in the search warrant of the following items: "proceeds of the sale of controlled substances, paraphernalia used for the preparation, delivery storage, consumption, ingestion of controlled substances, records of controlled substance sales, firearms, police radios and scanners, electronic paging devices, cellular telephones and other items traditionally associated with those persons who consume, deliver, or manufacture controlled substances." He argues that because the affidavit did not mention that the confidential informant saw anything other than the controlled substances purchased in the controlled buy, the magistrate issuing the search warrant did not have a substantial basis

for concluding that probable cause existed to search for the other items listed in the warrant. We disagree.

Arkansas Rule of Criminal Procedure 13.1 provides in part that the application for a search warrant shall be supported by an affidavit that particularly sets forth the facts and circumstances tending to show that the things listed are in the places to be searched. Here, the affidavit established probable cause to believe that sales of marijuana were occurring at the designated location. The other items listed in the affidavit, and challenged by appellant, are generally associated with the sales of controlled substances. We conclude that the affidavit particularly set forth facts and circumstances that tended to show the listed items would be found in the place to be searched. Moreover, once lawfully on the scene, the officers were entitled to seize evidence of crimes, fruits of crimes, or instrumentalities of crimes. Ark. R. Crim. Pro. 13.3(d).

For his fourth subpoint, appellant contends that because of the delay between the issuance of the search warrant and its execution, probable cause no longer existed when the search warrant was executed. The search warrant was issued on February 13, 2004, and it was executed on March 2, 2004. Appellant argues that this lapse of time abrogated the probable cause supporting the warrant. We disagree.

In *Gilbert v. State*, 341 Ark. 601, 605-06, 19 S.W.3d. 595, 598 (2000), our supreme court explained:

Rule 12.3(c) of the Arkansas Rules of Criminal Procedure provides that a search warrant shall be executed within a reasonable time, not to exceed sixty days.

Although the question of whether information in a search warrant can go stale before its execution is an issue this court has not yet addressed, Arkansas case law has decided whether such information can become stale before the warrant is issued. For the most part, these cases hold that a delay in applying for a warrant can diminish probable cause, but that the delay is "not considered separately, [and] the length of the delay is considered together with the nature of the unlawful activity and in the light of common sense." *White v. State*, 47 Ark. App. 127, 134, 886 S.W.2d 876 (1994). Moreover, the Arkansas Court of Appeals has held that when the criminal activity is "of a continuing nature," an issuing magistrate may utilize his or her common sense regarding the relative staleness of the information on which the warrant is sought. *Cardozo & Paige v. State*, 7 Ark. App. 219, 646 S.W.2d 705 (1983). In *Cardozo*, the court adopted the following rationale:

The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: The character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc.

Cardozo & Paige, 7 Ark. App. at 222, 646 S.W.2d at 707. We agree with the foregoing reasoning. In short, circumstances surrounding the issuance of a search warrant are interpreted in light of common sense, and this analysis can be extended by analogy to the execution of a warrant.

Here, in making his argument, appellant contends that the affidavit for the search warrant described only an isolated violation. That is not correct. The affidavit described two drug sales by appellant: one on August 30, 2003, made by a different confidential informant, and then the sale that was within seventy-two hours of February 13, 2004. Under the totality of the circumstances of this case, we conclude that the execution of the warrant in this case was not so delayed as to abrogate the probable cause.

Almost as an aside, appellant makes one additional argument under this first point of appeal. He asserts that the search warrant was not returned within five days as required by Rule 13.2 of the Arkansas Rules of Criminal Procedure. We merely note that the fifth day was a Sunday, March 7, 2004, and that Webb returned the warrant on Monday, March 8, 2004. In accordance with Rule 1.4 of the Arkansas Rules of Criminal Procedure, returning the warrant on the “next day which is neither a Saturday, Sunday, or a legal holiday” satisfied the time limit.

For his second and third points of appeal, appellant contends that the trial court erred when it denied his motion for production of a *res gestae* witness, *i.e.*, the identity of the confidential informant, and that the State committed a *Brady* violation with respect to his discovery requests concerning the search and seizure. The two points can best be addressed together, and we find no basis for reversal in either. Under both points, appellant contends that the information he requested was essential to his argument at the suppression hearing because without that information, it was not possible to determine the informant’s reliability. As we previously explained under subpoint B of appellant’s first point of appeal, establishing the reliability of the confidential informant was not required when controlled buys and the personal observations of the affiant, Deputy Webb, served as the basis for the affidavit. Accordingly, the information was not essential to appellant’s presentation of his case at the suppression hearing, and we find no reversible error.

Affirmed.

PITTMAN, C.J., and GRIFFEN, J., agree.