

RENDERED: October 31, 1997; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 96-CA-2421-MR

JOHN R. HIBBENS

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT  
HONORABLE JOHN ROBERT MORGAN, JUDGE  
ACTION NO. 96-CR-000023

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 96-CA-2827-MR

SANDY COMBS

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT  
HONORABLE JOHN ROBERT MORGAN, JUDGE  
ACTION NO. 96-CR-000023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING, VACATING, AND REMANDING

\* \* \*

BEFORE: GUDGEL, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: These are consolidated appeals from judgments convicting co-defendants/appellants of trafficking in a controlled substance in the second degree pursuant to conditional

guilty pleas. Appellants argue that the search warrant which lead to discovery of the controlled substances was defective because it did not describe the property to be seized. We agree and, thus, reverse the orders denying the motions to suppress, vacate the judgments of conviction, and remand for further proceedings.

On March 29, 1996, Officer Chalmer Wireman of the Magoffin County Sheriff's Department submitted an affidavit for a search warrant which provided as follows:

On the 25 day of March, 1996, at approximately 10:00 a.m. affiant received information from a confidential informant, that the affiant knows to be truthful, that [sic] has given the affiant information in the past year about unlawful drugs that proved to be true, the informant stated to the affiant [sic] that on March 22th [sic] 1996 at appoximately [sic] 7:30 p.m. the informant and another person went to Pine Point Apartments, Apartment B-9, [ ] Salyersville Ky. & bought form [sic] Sandy Coldiron, who was in Apartment B-9 a bag of marijuana, supposedly six (6) grams for the some [sic] of (25.00) twenty five dollars U.S. currency. This buy took place in Magoffin County, State of Ky.

Acting on the information received, affiant conducted the following independent investigation: That Sandy Combs Coldiron has a reputation by nieghbors [sic] people of the communtiy [sic] for dealing unlawful drugs.

In the space on the affidavit reserved for describing the personal property for which the police would be searching, it stated, "Apartment B-9 Rooms, ect. [sic]."

Based upon Officer Wireman's affidavit, the court issued a search warrant for the apartment of Sandy Combs which provided as follows:

Proof by affidavit having this day been made before me by Chalmer Wireman, a peace officer of Magoffin County Sheriff Department, that there is probable and reasonable cause for the issuance of this Search Warrant as set out in the affidavit attached hereto and made a part hereof as if fully set forth herein; you are commanded to make immediate search of the premises known and numbered as B-9 Pine Point Apartments more particularly described as follows: going east U.S. 460 from Magoffin County Courthouse on U.S. 460 to Junction Mtn. Pkwy. then east on U.S. 460 to the left side of U.S. 460 going east, the Pine Point Housing Complex B-Building Apartment B-9 and/or in a vehicle or vehicles described as: Owned by Sandy Combs, Cole, Coldiron and/or on the person or persons of: Sandy Combs, Cole, Coldiron person or premises. The following described personal property: Apartment B-9 Rooms Etc. and if you find the above described property or any part thereof you will seize the property and deliver it forthwith to me or any other court in which the offense in respect to which the property or things taken is triable, or retain it in your custody subject to order of said court.

Pursuant to the search warrant to which the affidavit was attached, the Magoffin County Police searched the apartment of Sandy Combs and seized marijuana, scales, rolling papers, bottles of controlled substances, and cash. Thereafter, on May 16, 1996, appellants, Sandy Combs and John Hibbens, were indicted for: trafficking in marijuana, second degree; two counts of controlled substances not in original containers; and possession of drug paraphernalia.

On August 19, 1996, the trial court held a suppression hearing on the validity of the search warrant. Appellants argued that the search warrant was defective because it failed to describe the property to be seized as required by the Kentucky and United States Constitutions. The Commonwealth argues that the language contained in the affidavit was incorporated by the search warrant and was described therein with sufficient particularity to identify the seized property. The trial court denied the appellants' motions to suppress.

Subsequently, appellants entered conditional guilty pleas to trafficking in a controlled substance, second degree, reserving the issue of the validity of the search warrant for appeal. Both appellants were sentenced to one year imprisonment, probated for one year. These appeals followed.

The Fourth Amendment to the United States Constitution provides that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the person or things to be seized." Section 10 of the Kentucky Constitution contains a similar provision that "[n]o warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be. . . ." In interpreting the above provisions, it has been held that a search warrant "must contain such a description of the place, person or thing to be searched or seized as will reasonably identify them." Williams v. Commonwealth, Ky., 261 S.W.2d 416, 417 (1953).

Appellants contend that because the warrant only described the place (B-9 Pine Point Apartments) and person (Sandy Combs, Cole, Coldiron) with particularity and did not describe any personal property for which the police were searching and ultimately seized, the warrant was defective under both the Federal and Kentucky Constitutions. The Commonwealth counters that because the affidavit in support of the search warrant was attached to the search warrant, the affidavit and search warrant should be read together. In reading both together, the Commonwealth maintains that it is clear that the police were searching for unlawful drugs.

The Commonwealth cites no authority for its position that the affidavit and search warrant can be read together to meet the specific description requirement, and we believe prevailing authority on the issue is contrary to the Commonwealth's position. In construing Section 10 of the Kentucky Constitution, the Court in Coker v. Commonwealth, Ky. App., 811 S.W.2d 8 (1991) stated:

This section has long been held to require that the affidavit for a search warrant reasonably describe the property or premises to be searched and state sufficient facts to establish probable cause for the search of the property or premises. Commonwealth v. Diebold, 202 Ky. 315, 259 S.W. 705 (1924). Likewise, the warrant itself must contain a reasonably specific description of the object of the search. William v. Commonwealth, Ky., 261 S.W.2d 416 (1953). (Emphasis added.)

Id. at 9.

The purpose behind the specific requirements for search warrants is to avoid cloaking the police with selective discretion in determining what may be searched as such discretion would allow intrusions upon the property of strangers to the process. Commonwealth v. Smith, Ky. App., 898 S.W.2d 496 (1995). One purpose of the search warrant itself is to demonstrate judicial authority for the search to the owner or person in possession of the property in order to show that it is a lawful search. The affidavit in support of the search warrant does not serve that purpose, but rather is to show probable cause for the search to the judicial body authorizing the search. Although the affidavit was attached to the search warrant in the instant case, it is not required to be shown to the person occupying the property. In any event, the affidavit in the present case did not explicitly state the personal property for which the police were searching. It only stated the probable cause information regarding unlawful drugs being sold out of the apartment by Sandy Combs.

The degree of specificity required in a search warrant is flexible and will vary depending on the crime involved and the types of items sought. United States v. Henson, 848 F. 2d 1374 (6th Cir. 1988), cert. denied by 488 U.S. 1005, 109 S. Ct. 784, 102 L. Ed. 2d 776 (1988). General warrants are unconstitutional, and a general description in a search warrant is only acceptable where a specific description is unavailable. United States v. Viers, 637 F. Supp. 1343 (W.D. Ky. 1986). In United States v.

Blakeney, 942 F. 2d 1001 (6th Cir. 1991), cert. denied by 502 U.S. 1000, 112 S.Ct. 646, 116 L. Ed. 2d 663 (1991), a warrant to search for "jewelry" was held to be overbroad, where inventory of items taken during a jewelry store robbery was available to the agent applying for the warrant.

In the case at bar, the warrant should have, at the very least, stated that the authorities were searching for unlawful drugs or controlled substances. The listing of the apartment and the person to be searched was simply too general given the information available to the authorities regarding the reported drug activity in the apartment. Accordingly, the failure to list any personal property intended to be searched rendered the search warrant defective under the Kentucky and United States Constitutions.

For the reasons stated above, the orders of the Magoffin Circuit Court denying appellants' motions to suppress are reversed. Hence, we also vacate the judgments of conviction entered pursuant to appellants' conditional guilty pleas and remand for further proceedings.

GUIDUGLI, JUDGE, CONCURS.

GUDGEL, JUDGE, DISSENTS.

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