

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001415-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 98-CR-00063

JEFFREY L. BOONE; AND
AUDREY KELLY BOONE

APPELLEES

OPINION
REVERSING & REMANDING
** **

BEFORE: GUDGEL, CHIEF JUDGE, GUIDUGLI AND McANULTY, JUDGES.

McANULTY, JUDGE: The Commonwealth of Kentucky appeals from the Washington Circuit Court's suppression of evidence as it pertains to all evidence seized in a single-family residence owned by Jeffrey and Kelly Boone. We reverse.

On October 5, 1998, Lieutenant Tom Finck of the Kentucky State Police advised Detectives Kim Hill and Tony Wells that he had received a call from Lieutenant Shelby Lawson, also of the Kentucky State Police. Lieutenant Lawson informed Lieutenant Finck that marijuana was being grown behind Jeff Boone's residence at the end of Walker Lane.

On the basis of this information, on October 6, 1998, Kentucky State Trooper Patrick Williams assisted Detectives Hill and Wells in locating Walker Lane because Trooper Williams worked the area. The three law enforcement officers went directly to the home on Walker Lane where Kelly and Jeffrey Boone resided. At this point, the officers did not know the actual address of the house. In addition, all three officers later testified that they never observed the house number throughout the time they spent on the property. Kelly Boone met the officers in the driveway. They explained to her that they had received a complaint that there was marijuana growing behind the house. Kelly Boone told the officers that they were free to look anywhere they liked on the property. Kelly Boone went inside the residence. The officers located two marijuana plants growing directly behind the house beside the deck and some loose marijuana leaves on the ground.

The detectives went to the front door of the residence to get Kelly Boone and show her the plants. They asked her if they could search the house and she refused. Detective Hill informed her that she was under arrest for cultivation of marijuana for the plants that the officers found behind the house. Trooper Williams took Kelly Boone to the police department. Detectives Wells and Hill remained at the Boone's property while Trooper Williams processed Kelly Boone and obtained a search warrant for the residence.

Trooper Williams testified that, while at the police department, he asked Kelly Boone for her address for the purposes

of completing the citation. According to Trooper Williams, Kelly Boone responded that she lived at 841 Walker Lane. Kelly Boone testified that she did not tell any of the three officers an address; however, she did provide Trooper Williams with her driver license that listed her address as 841 Walker Lane. 841 Walker Lane was Jeffrey and Kelly Boone's previous address and Kelly Boone had not had the address updated on her license. In actuality, Jeffrey and Kelly Boone's address and the house that was searched on October 6, 1998, was 900 Walker Lane. Trooper Williams then proceeded to the county attorney's office and had a search warrant and affidavit prepared for the address of 841 Walker Lane to enable the officers to search the Boone's home. From the county attorney's office, he went to the trial commissioner for Springfield, Kentucky to have the trial commissioner sign the search warrant.

The trial commissioner issued a search warrant and Trooper Williams returned to Jeffrey and Kelly Boone's residence at 900 Walker Lane. The ensuing search produced, among other items, over 150 pounds of marijuana at different stages of the curing process, over \$78,000.00 in cash, and a variety of weapons and ammunition.

Jeffrey and Kelly Boone filed motions to suppress the evidence seized pursuant to the warrant. The Washington Circuit Court held an evidentiary hearing. The Commonwealth and the Boones agree that the police searched 900 Walker Lane, not 841 Walker Lane as indicated on the search warrant. The Commonwealth argued that Kelly Boone had provided this incorrect address and

the house was not clearly marked with the number. Thus, the hearing was limited to the issue of whether the search warrant provided an accurate description of Jeffrey and Kelly Boone's residence. Trooper Williams and Detectives Wells and Hill testified on behalf of the Commonwealth; Jeffrey and Kelly Boone, and their home builder, David Lee Mudd, testified on behalf of the Boones. Ultimately, the court granted the motions to suppress the evidence seized inside the home. It made a number of factual findings and concluded that the search warrant was invalid on its face because of the number of errors and omissions in the information provided by Trooper Williams on the search warrant and affidavit in support of the search warrant. Moreover, the trial court found that the officers did not have probable cause to obtain the search warrant initially.

The Commonwealth identifies two issues on appeal. The first issue is whether the trial court erred in holding that the officers did not have probable cause to obtain a search warrant for the Boone's residence. The second issue is whether the trial court erred in suppressing the evidence seized at the Boone home on the basis that the search warrant was facially deficient. Regarding the first issue, the standard of review for this court is the same standard for the trial court – whether the issuing magistrate had a “substantial basis for . . . conclud[ing]” that a search would uncover evidence of wrongdoing.” Illinois v. Gates, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (quoting Jones v. United States, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)); accord Beemer v. Commonwealth,

Ky., 665 S.W.2d 912, 915 (1984) (Kentucky courts comply with standard of review set out in Illinois v. Gates).

The trial court decided that the officers did not have probable cause to obtain a search warrant for the Boone's residence. We disagree. The task of the issuing magistrate in concluding that probable cause existed for the search warrant was set out by the Supreme Court in Illinois v. Gates, 462 U.S. at 238, and adopted by Kentucky courts in Beemer v. Commonwealth, 665 S.W.2d at 915. The Court stated:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. at 238, citations omitted.

Consistent with the "Fourth Amendment's strong preference for searches conducted pursuant to a warrant," Illinois v. Gates, 462 U.S. at 236 (citing United States v. Ventresca, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)), in this case, the trial court was required to pay great deference to the trial commissioner's determination of probable cause. Trooper Williams provided the information on the affidavit for the search warrant. The affidavit states in part:

On the 5th day of October, 1998, at approximately 2:00 p.m., affiant received information from Lieutenant Fink [sic] that marijuana plants were located behind a Boone residence on Bloomfield Road. Since John

Boone is in prison, Affiant went to Jeff Boone's residence on October 6, 1998. Affiant, Det. Ken Hill and Det. Tony Wells met Kelly Boone, Jeff Boone's wife, in the drive-way. She was told that they had been informed that marijuana was growing behind the house and was possibly in the barns. She gave them permission to look behind the house. Affiant found two plants and two piles of shake. Plants were next to the deck. The detectives showed her where the plants were and asked her if they could search her house. She refused and was charged with cultivation. Kelly Boone wanted to get children's clothes in the house. When the Affiant and the detectives went into the doorway, the Affiant smelled a strong smell of marijuana in the residence.

We think the totality of the circumstances, including the information provided by Lieutenant Lawson and the subsequent investigation by the other officers of the Boone's property, established a substantial basis for the trial commissioner to reasonably believe that there was a fair probability that Jeffrey and Kelly Boone had marijuana in their residence.

The trial court had found that the officers did not properly obtain probable cause because they did not have the right to go in the doorway of Kelly Boone's home. This finding is incorrect for two reasons. First, the doorway of a person's home is a public place where the person has no reasonable expectation of privacy. See Talbott v. Commonwealth, Ky., 968 S.W.2d 76, 81 (1998). Second, Kelly Boone was under arrest at the time she requested re-entry to her home and Trooper Williams and the detectives went into the doorway. Out of concern for the officer's own safety and in order to ensure that Kelly Boone did

not escape, it would have been reasonable for the officers to search any area from which Kelly Boone might gain possession of a weapon or destroy evidence. See Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); Collins v. Commonwealth, Ky., 574 S.W.2d 296 (1978). In this case, the officers did not search the Boone's residence nor accompany Kelly Boone while she was gathering the children's clothing. Instead, they merely stood in the doorway. Under the circumstances of this case, the officers were properly in the doorway of the Boone's residence.

We conclude that the trial court gave no deference to the trial commissioner's determination of probable cause and construed the affidavit in a technical, rather than common-sense manner. In addition, we conclude that the affidavit was sufficient to support probable cause for the issuance of the search warrant.

The second issue is whether the trial court correctly concluded that the warrant was facially deficient. The standard of review is whether the factual findings of the trial court are supported by substantial evidence and are not clearly contrary to law. RCr 9.78; Cormney v. Commonwealth, Ky. App., 943 S.W.2d 629, 631 (1997). Thus, the Commonwealth has the burden to show that the trial court's ruling was clearly erroneous. Clark v. Commonwealth, Ky. App., 868 S.W.2d 101, 103 (1993). The "errors and omissions" found by the trial court were that (1) the search warrant had the incorrect address, and the affidavit mentioned a

different street; (2) "the address was handwritten on the search warrant while the rest of the search warrant was typed;" and (3) "the search warrant itself does not describe the house which was searched, but instead more fully describes the house across the road and down about 200 yards."

First, although the search warrant contained the incorrect address, this does not necessarily render the evidence inadmissible. In United States v. Leon, 468 U.S. 897, 913, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), the Supreme Court recognized the good faith exception to the Fourth Amendment exclusionary rule. The Court held that the Fourth Amendment exclusionary rule could be modified because one of the purposes of the rule is to deter illegal police action and, in those cases where the police had a reasonable good-faith belief that the search or seizure was in accord with the Fourth Amendment, the remedial objective of the exclusionary rule is not served. Leon, 468 U.S. at 908-11. In light of Leon, evidence of a search pursuant to a warrant may be admissible even though the warrant contains the incorrect address, but this is wholly dependent on the circumstances of the particular case. See United States v. Gordon, 901 F.2d 48, 50 (5th Cir. 1990). The conduct of the officer in obtaining the search warrant must be "objectively reasonable" and the officer must have acted in "objective good faith." Leon, 468 U.S. at 919-20. In this case, we conclude that even if the warrant was facially deficient due to the wrong

address, the officers executing the warrant had a good faith belief that the correct address was 841 Walker Lane.

This belief was reasonable given the facts that Kelly Boone provided this address and none of the three officers that were at the home that day saw the house number of "900" on the house. Photographs in the record show that the number was not conspicuous. In addition, the officers only intended to search Jeffrey and Kelly Boone's residence. Moreover, once Trooper Williams obtained what he believed was a facially valid search warrant, he returned to the same home he had visited only a few hours earlier - the same home where Detectives Wells and Hill had been waiting the entire time Trooper Williams was gone. Finally, the officers only searched 900 Walker Lane on October 6, 1998.

The trial court found that the good faith exception was inapplicable, relying on Crayton v. Commonwealth, Ky., 846 S.W.2d 684, 687-688 (1992). Crayton stated that Leon required suppression as a remedy when the affidavit contained "false or misleading information." Crayton, 846 S.W.2d at 687. However, Crayton was merely summarizing Leon, which states that "[s]uppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." Leon, 468 U.S. at 923. In this case, the officer who prepared the affidavit did not know the information was false or recklessly disregard the truth. Therefore, the false

information does not preclude the good faith exception where, as here, an officer acted in good faith reliance on incorrect information.

In further support of the finding that the good faith exception was inapplicable in this case, the trial court cited Coker v. Commonwealth, Ky. App., 811 S.W.2d 8 (1991). Coker holds that suppression of evidence is appropriate when a search is conducted pursuant to a warrant that is so "obviously invalid for that purpose" that it is impossible for the police to reasonably rely on it. Id. at 9. However, Coker is distinguishable from this case. In Coker, the district judge issued a search warrant for Coker's apartment at 814 Glen Hollow Drive. Id. at 8. Accordingly, the affidavit in support of the search warrant provided the address and description of this address and set out probable cause to search the location. Id. Following a search of 814 Glen Hollow Drive, the police learned that Coker was in the process of moving to a new address on Royal Gardens Court. Id. The lead detective in the case called the district judge to inform him of the new address. Id. at 9. The district judge advised the detective "to alter the search warrant by striking the Glen Hollow address and description and inserting the Royal Gardens Court address and description." Id. After the search of the Royal Gardens Court address, the judge signed the altered warrant. Id. Ultimately, the Court of Appeals held that the search of the Royal Gardens Court address was illegal because there was no affidavit in support of the altered search warrant,

thus an officer would have no "reasonable grounds for believing the warrant was properly issued." Id. at 9 (citing Leon, 468 U.S. at 923 n. 24). In this case, despite the fact of the incorrect address on the affidavit and the search warrant, the officers had a reasonable, good faith belief that the address was correct. In addition, the search warrant was supported by an affidavit providing the address and description of the Boone's residence and setting out probable cause to search the residence. Finally, the officers searched only the residence for which they believed the search warrant was issued.

Next, despite the fact that Trooper Williams wrote the address on the search warrant, it did not make the search warrant facially deficient. The address of 841 Walker Lane was provided on the affidavit in support of the search warrant which was incorporated by reference in the search warrant. See generally Richmond v. Commonwealth, Ky., 637 S.W.2d 642,646 (1982) (holding that the affidavit was made a part of another affidavit by reference and together the affidavits provided probable cause for the issuance of a search warrant).

Finally, after reviewing the proof taken at the suppression hearing in reference to the *description* of the house that was searched, we find that the trial court's finding was not supported by substantial evidence. Kentucky law sets out some guiding principles regarding the sufficiency of the description in an affidavit for a search warrant. "A search warrant is sufficiently accurate if it describes with reasonable certainty

the location of the premises to be searched." Taulbee v. Commonwealth, Ky., 465 S.W.2d 51, 52 (1971). "The sufficiency of a description of property to be searched is a relative thing often dependent on facts outside of those contained in the affidavit or warrant itself." Commonwealth v. Appleby, Ky. App., 586 S.W.2d 266, 269 (1978). Ultimately,

. . . if it should appear that the affidavit failed to describe with particularity the place to be searched . . . or was untrue, misleading, or that the judicial officer merely acted as a rubber stamp for the police, then public policy would require suppression as the essential purpose of the warrant would have been defeated.

Crayton v. Commonwealth, Ky., 846 S.W.2d 684, 688 (1992). The description provided by Trooper Williams on the affidavit for search warrant and the search warrant is as follows:

A plain sided two story frame house with a deck surrounding it and flower beds made out of railroad ties. Located .8 of a mile from Hwy. 55. Walker Lane is 3.2 miles north on KY 55. Also all barns and outbuildings located on the property.

The testimony of Jeffrey and Kelly Boone and their builder, David Lee Mudd, established that their residence at 900 Walker Lane is "referred to" as rustic cedar sided, single story house with a walkout basement and garage, a porch, and a retaining wall made out of railroad ties. In addition, Jeffrey Boone described 841 Walker Lane, their previous residence, as a "plain type" sided "two story house with a deck on the front, side and the back" with "railroad ties encasing landscaping beds."

Trooper Patrick Williams is the law enforcement officer that provided the description of Jeffrey and Kelly Boone's residence where he had been just hours before the search warrant was obtained. Trooper Williams and the two detectives went directly to 900 Walker Lane on October 6, 1998. 900 Walker Lane was the only house that the officers visited that day. All three officers testified that they did not see the house number throughout their time spent on the property and in the residence. Detectives Hill and Wells remained at 900 Walker Lane the entire time that Trooper Williams was gone to obtain the search warrant. When Trooper Williams returned with the search warrant to 900 Walker Lane, Jeffrey and Kelly Boone's residence, the house was searched.

We conclude that the description provided by Trooper Williams on the search warrant described 900 Walker Lane with reasonable certainty. No two persons are going to describe something exactly the same. We do not find that Jeffrey and Kelly Boone and their builder, David Lee Mudd, offered any evidence, let alone substantial evidence, that Trooper Williams was particularly describing 841 Walker Lane. It is significant that Trooper Williams was both the affiant and one of the officers that executed the search warrant and other officers remained at the house in Williams' absence. Thus, there was no danger that the wrong house would be searched. See Appleby, 586 S.W.2d at 269. Accordingly, we reverse the order of the trial court to suppress all evidence seized from the 900 Walker Lane residence.

ALL CONCUR.

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