RENDERED: DECEMBER 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NOS. 1998-CA-002867-MR & 1999-CA-001335-MR

ROOSEVELT QUINNEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 97-CR-000721

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING IN PART; AFFIRMING IN PART
** ** ** ** **

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

McANULTY, JUDGE: Roosevelt Quinney entered a conditional guilty plea to amended charges of illegal possession of a controlled substance, illegal possession of drug paraphernalia while in possession of a firearm, illegal possession of marijuana while in possession of a firearm, and possession of a firearm by a convicted felon. Additionally, the judgment was amended to reflect that the offense of illegal possession of a controlled substance was *not* while in possession of a firearm. The court sentenced appellant to ten years in prison in accordance with the conditional plea agreement. This case consolidates two appeals from that judgment.

At issue in the first appeal (1998-CA-002867-MR) is whether the trial court erred in failing to hold an evidentiary hearing on appellant's motion to suppress the evidence obtained in the search of his residence pursuant to a warrant. The Commonwealth maintains that a defendant is not entitled to an evidentiary hearing unless he makes a preliminary showing of an intentional or reckless false statement in the affidavit for a search warrant. The trial court agreed and denied the motion to suppress without an evidentiary hearing. We believe that the court held the appellant to a standard he was not required to meet in order to obtain a hearing on his motion to suppress. Therefore, we reverse.

A search warrant was executed at the residence of appellant and Bertie Yelverton. The warrant was issued based upon the affidavit of a police detective. In the affidavit, the detective states that he received information from a confidential informant and from police officers that drug trafficking was taking place at that residence. The detective states that he conducted surveillances of the residence on five separate dates in January, 1997.

Appellant filed a motion to suppress on December 18, 1997, on the grounds that 1) the affidavit was based on information provided by a confidential informant, 2) the information provided by the informant was vague, 3) the affidavit did not assert whether the informant had proved to be reliable, 4) the affidavit failed to name the person to be searched, and 5) there was no probable cause to search the residence. In

addition, on the same date, appellant filed a motion to reveal the identity of the confidential informant. The Commonwealth responded on January 8, 1998, asserting that appellant was not entitled to an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). That case held that the Fourth and Fourteenth Amendments entitle a defendant to a veracity hearing if the defendant makes a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included in the affidavit a false statement which was necessary to the finding of probable cause. Id. at 171-172, 57 L. Ed. 2d at 682.

At a hearing on appellant's motion to suppress, appellant asserted that a hearing was commonly allowed under these circumstances. Appellant asserted a desire to subpoena the officers who executed the search warrant. The Commonwealth argued that under Franks a defendant is not allowed a hearing of any sort without an allegation of a false statement. The court agreed that Franks precluded a hearing on the suppression motion. The trial court informed appellant that Franks required that he make a preliminary showing of falsity before he would be entitled to an evidentiary hearing. The trial court ruled that it would allow defense counsel to do "whatever she needs to do to make her record," but first required a written response from the defense.

Appellant filed a written response on January 27, 1998, which asserted that the rule cited from Franks was not the standard adopted for suppression issues and that he was still entitled to a hearing on his motion to suppress. In June, 1998,

appellant obtained new counsel (his third) and again requested an evidentiary hearing on the motion to suppress. The trial court overruled appellant's motion to reveal the identity of the confidential informant on June 3, 1998. In a motion filed on June 10, 1998, appellant raised new theories for suppression of evidence based on alleged delay in securing the warrant, unreasonable time and manner of execution, and a search in excess of the scope of the warrant. Appellant filed a supplemental motion alleging that the affidavit for the warrant failed to establish probable cause. The Commonwealth again responded that appellant was not entitled to an evidentiary hearing based on Franks.

Thereafter, appellant endeavored to make a preliminary showing of false statements in the search warrant affidavit. Appellant filed a second supplement to the motion to suppress evidence on July 22, 1998. Therein, appellant asserted that the search warrant contained intentional or reckless false statements and omissions. Further, he alleged that the affidavit was insufficient to establish probable cause even if the "deficiencies" he alleged were corrected. The court held a hearing on August 10, 1998, in which it denied the motion to suppress on appellant's arguments regarding the delay in securing the warrant, the time and manner, and scope of the search conducted. The court denied appellant the opportunity to make a Franks offer of proof because appellant had not served the Commonwealth with notice. Finally, appellant filed a sealed motion on August 13, 1998, in which he argued that he was

entitled to an evidentiary hearing without a preliminary showing, and in the alternative, requested to be allowed to make a preliminary showing in an ex parte hearing.

On August 20, 1998, the trial court entered an opinion and order. The court determined that a Franks "preliminary showing" was required in Kentucky, but Franks did not provide for an ex parte hearing. The court went on to examine the offer of proof made by appellant regarding falsehoods and omissions in the warrant affidavit. The court concluded that none of the inaccuracies or omissions could be considered deliberate or made with reckless disregard, but were negligent or innocent mistakes. The court concluded that appellant was not entitled to a hearing on his motion to suppress evidence from the search.

Appellant alleges that the trial court erred in not granting a hearing pursuant to RCr 9.78. The Commonwealth claims that appellant received all of the hearings to which he was entitled. After reviewing the record of the motions and hearings, we conclude that the trial court erred in denying appellant an evidentiary hearing. A defendant may challenge various aspects of the search in seeking suppression, such as the magistrate's determination of probable cause, as in this case. See Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984). Appellant challenged the probable cause determination and the information provided by the confidential informant. These are different allegations than those which require a Franks-type inquiry.

Furthermore, RCr 9.78 grants a defendant a hearing on a motion for suppression of evidence. The rule states that if a defendant moves to suppress evidence consisting of the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and enter findings of fact into the record. "RCr 9.78 places affirmative duties upon the trial court. The rule does not require that the defendant move for an evidentiary hearing." Mills v. Commonwealth, Ky., 996 S.W.2d 473, 481 (1999). According to RCr 9.78, if the accused at "anytime" before or during trial makes a request, the trial court "shall conduct a hearing." Moore v. Commonwealth, Ky., 634 S.W.2d 426, 433 (1982). RCr 9.78 mandates that the trial court hold an evidentiary hearing outside of the presence of the jury on a motion to suppress evidence.

Thus, we find that it was error for the trial court to require the defendant to jump through additional hoops to receive a hearing on his motion to suppress. An evidentiary hearing is mandated under the Rules of Criminal Procedure. The trial court should have granted an evidentiary hearing to appellant on the issues he raised in his initial motion to suppress as well as those that the court entertained thereafter. Although, the trial court held some hearings on appellant's motions, the court never permitted appellant an evidentiary hearing as specifically requested.

In the second appeal (1999-CA-001335-MR), appellant alleges that the trial court improperly denied shock probation on the basis that the court lost jurisdiction over the case when

appellant took an appeal. A review of the trial court's order in this case reveals that, although the trial court expressed reservations about its jurisdiction, appellant's shock probation motion was denied on the merits. The trial court stated that appellant, in his motion,

> made no attempt to show any change of circumstances since the time of sentencing. At that time, the Court determined that, based on the Defendant's prior record, it was necessary for him to serve ten years in the penitentiary. The Court has no reason to alter that conclusion.

The court thereafter cited cases which said that it was not within the court's jurisdiction to take any action once an appeal had been perfected.

Appellant argues that the trial court erred in concluding that it had no jurisdiction to consider his shock probation motion. He alleges that the court did not rule on the merits due to the fact that it concluded it had no jurisdiction.

We find from the above ruling that the trial court considered the merits of appellant's motion for probation and denied the motion based on his prior record. The trial court ruled on the motion despite its conclusion that it had lost jurisdiction. A trial court may give multiple or alternative grounds for its decision, and we are bound to affirm if any of the grounds are valid. Furthermore, the trial court did have jurisdiction according to the terms of KRS 439.265 to consider the shock probation motion. Thus, appellant has already received consideration of his shock probation motion by a court with proper jurisdiction, and he is not entitled to any other relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

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