

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001576-MR

REGINALD WHITTLE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE LISABETH H. ABRAMSON, JUDGE  
ACTION NO. 98-CR-000514

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BARBER, COMBS, and TACKETT, Judges.

COMBS, JUDGE: Reginald Whittle brings this appeal from a June 15, 2000, judgment of the Jefferson Circuit court entered upon a conditional plea of guilty under Ky. R. Crim. P. (RCr) 8.09. We affirm.

The sole issue presented for our consideration is whether the circuit court erred by failing to suppress evidence seized during the execution of a search warrant. We review the factual determination of the circuit court pursuant to the substantial evidence standard. RCr 9.78; see Diehl v. Commonwealth, Ky., 673 S.W.2d 711 (1984). Our review of the pertinent law is *de novo*.

Whittle was indicted in February 1998. He was charged with trafficking in a controlled substance in the first-degree

while in possession of a firearm and with possession of a firearm by a convicted felon. The indictment followed police officers' discovery of cocaine, weighing scales, and firearms during their execution of a search warrant at a West Louisville residence.

In May 1998, Whittle began filing a series of motions to suppress the recovered evidence, alleging that it had been discovered under a warrant obtained on the basis of an inaccurate affidavit. In its responses, the Commonwealth argued that the search and seizure were proper. Following a brief hearing, the Jefferson Circuit Court concluded that the affidavit submitted in support of the warrant had been sufficient and that the search was indeed proper.

Pursuant to RCR 8.09, Whittle subsequently entered a conditional plea of guilty to possession of a controlled substance in the first degree. He was sentenced to four-years' imprisonment.

Whittle argues on appeal that the circuit court erred in denying his motions to suppress because Officer Thomas M. Strong of the Louisville Division of Police presented an affidavit in applying for the search warrant that contained false and misleading information. Thus, Whittle contends that the evidence was seized as part of an illegal search and must be suppressed. We disagree.

In order to attack a facially sufficient affidavit, one must show that: (1) the affidavit contains intentionally or recklessly false statements and (2) the affidavit, when and if purged of its falsities, would not be sufficient to support a

finding of probable cause. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). An affidavit will be vitiated only if the defendant can show: (1) that the police included facts with the intent to mislead or in reckless disregard of whether they would render the affidavit misleading and (2) that the affidavit, stripped of this information, would not have been sufficient to support a finding of probable cause. The circuit court concluded that the appellant had failed to make either showing in this case.

The contested affidavit was executed by Officer Strong on December 16, 1997. Whittle alleges that it contained three misrepresentations. The first was the false allegation that he "was videotaped on December 11, 1997 conducting a drug transaction." Brief at 5. A close examination of the affidavit, however, reveals that it includes no such information. The affidavit carefully relates the officer's observations of Whittle on December 16, 1997; it clearly distinguishes the apparent drug transaction from an earlier point in time when Whittle had indeed been the target of videotaped surveillance.

Next, Whittle argues that "the affidavit suggest[ed] that [he] was arrested for a drug transaction [on December 11, 1997], [although] he was [actually] arrested on a bench warrant for a prior traffic offense." Brief at 5. Again, a close reading of the affidavit indicates only that uniformed officers were summoned to the scene following Officer Strong's observations and that an arrest was made. The affidavit does not indicate that Whittle was arrested for the alleged drug

transaction. However, it does describe a marijuana cigarette recovered from Whittle's vehicle following his arrest and a small plastic storage bag recovered at the scene.

Finally, Whittle contends that "the affidavit [falsely] claim[ed] that the officer videotaped [him] conducting a drug transaction on December 16, 1997." However, the affidavit does not indicate that the apparent transaction was videotaped. Moreover, Whittle offers no evidence to suggest that the substance of the officer's statement (that the appellant was observed participating in a drug transaction) was intentionally or recklessly false. Whittle failed to convince the trial court that Officer Strong had included facts in his affidavit with the intent to mislead or that he recklessly disregarded whether those facts would make the affidavit misleading. Thus, we need not consider whether the affidavit, purged of the challenged statements, would nonetheless have been sufficient to support a finding of probable cause.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Irvin J. Halbleib  
Louisville, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Perry T. Ryan  
Assistant Attorney General  
Frankfort, KY