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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001892-MR

ROBERT FOWLER — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
INDICTMENT NO. 00-CR-00046

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING IN PART

AND

REVERSING IN PART

* * * * * * * * *

BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges

HUDDLESTON, Judge: Robert Fowler appeals from an August 3, 2000, final judgment and an August 7, 2000, amended judgment entered by Fayette Circuit Court, following his conditional guilty plea[1] to one count of felony trafficking in marijuana[2] in which he reserved his right to appeal the circuit court's denial of his motion to suppress evidence and denial of his motion for the return of property.

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[1] Ky. R. Crim. Proc. (RCr) 8.09.

[2] Ky. Rev. Stat. (KRS) 218A.1421.

Betty Moore worked for Louisa Fowler, Fowler's deceased mother, as the caretaker of Ms. Fowler's residence at 409 Bristol Road in Lexington. On November 18, 1999, sometime after Ms. Fowler had died, Moore found several gallon-sized baggies that contained what she suspected to be marijuana in a bathroom cabinet at 409 Bristol Road. Moore telephoned a secretary at the Drug Enforcement Agency's Lexington office who advised her to contact the Lexington police. On November 19, 1999, Moore returned to 409 Bristol Road and removed one of the baggies of suspected marijuana and took it to the DEA office where she meet with Lexington Police Detective Pete Ford. Before she left the residence, Moore found a note from Fowler, who was the executor of his mother's will. In the note Fowler thanked Moore for her services and asked her to return the keys and garage door opener to the residence.

Based on Moore's information, Ford obtained two search warrants, one for 409 Bristol Road and the other for 2440 Millbrook Drive, Fowler's residence. Police executed both warrants and found several baggies of a substance believed to be marijuana at 409 Bristol Road and a substance believed to be marijuana, rolling papers, scales, firearms and approximately $8,000.00 at 2440 Millbrook Drive.

On January 18, 2000, a Fayette County grand jury indicted Fowler for trafficking in marijuana over five pounds[3] and possession of drug paraphernalia, second offense.[4] Subsequently, Fowler moved to suppress the evidence and argued that both search

[3] KRS 218A.1421.

[4] KRS 218A.500.

warrants were issued without probable cause because Moore lacked credibility and reliability and police failed to connect Fowler to the marijuana at either residence. Following an evidentiary hearing, the trial court denied Fowler's motion with respect to 409 Bristol Road, but granted the motion with respect to 2440 Millbrook Drive, suppressing the evidence obtained there.[5]

On June 7, 2000, Fowler moved to return the money seized from 2440 Millbrook Drive. The Commonwealth countered by moving, pursuant to Kentucky Revised Statute (KRS) 218A.410, to forfeit the money found at 2440 Millbrook Drive. Fowler argued that the Commonwealth could not forfeit the money since it had been illegally seized. Further, Fowler contended that part of the money came from his most recent paycheck, which he produced at the time of the search, and that the rest was Debbie Preston's gambling winnings, for which Fowler provided partial documentation at the suppression hearing. The circuit court ordered the money forfeited. Later, on June 9, 2000, Fowler entered a conditional guilty plea to trafficking in marijuana greater than eight ounces but less than five pounds and was sentenced to three years' imprisonment. Fowler reserved his right to appeal the circuit court's denial of his motion to suppress and his motion for return of property. The circuit court sentenced Fowler consistent with the Commonwealth's recommendation.

On appeal, Fowler raises two assignments of error. First, he argues that the circuit court erred in denying his motion

[5] The Commonwealth has not appealed from the order suppressing evidence seized at 2440 Millbrook Drive.

to suppress evidence seized from 409 Bristol Road because the affidavit submitted to obtain the search warrant was insufficient to support a finding of probable cause. Second, Fowler argues that the circuit court erred in forfeiting the money from 2440 Millbrook Drive because it had been illegally seized and was not contraband since it was not connected to any criminal activity.

When reviewing suppression hearings, we use a two-prong standard.[6] First, we accept the circuit court's factual findings as conclusive if they are supported by substantial evidence.[7] Second, we review the lower court's decision *de novo* to determine if it was correct as a matter of law.[8]

In his first assignment of error, Fowler argues that the affidavit in support of the search warrant was insufficient to support a finding of probable cause by the issuing judge. Fowler contends that Moore, the named informant upon whom Ford relied, was neither credible nor reliable. Fowler argues that Moore lacked credibility because he had fired her; that her information lacked reliability because Ford failed to corroborate it and that Ford failed to connect Fowler with 409 Bristol Road and the marijuana found there. Therefore, Fowler concludes, the warrants lacked probable cause and should have been suppressed.

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[6] Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376, 380 (2000), sets forth the two-prong standard that this Court uses when reviewing a circuit court's denial of a motion to suppress that was the subject of an evidentiary hearing.

[7] Id. quoting RCr 9.78 and Adcock v. Commonwealth, Ky., 976 S.W.2d 6, 8 (1998).

[8] Id. quoting Commonwealth v. Opell, Ky. App., 3 S.W.3d 747, 751 (1999).

In the instant case, Moore told Ford that Fowler was a white male, approximately 53 years old; that he resided at 2440 Millbrook Drive; and that he had been arrested in the past for drugs. Ford independently corroborated this information and discovered that Fowler had registered his vehicle at 409 Bristol Road. Further, Ford learned, Fowler had resided at 409 Bristol Road as recently as 1997, the date of his last drug arrest.

When the issuing judge reviewed the affidavit to determine probable cause, he had an affirmative duty to consider the totality of the circumstances as set forth in the affidavit.[9] When the circuit court reviewed the issuing judge's decision at the suppression hearing, it had an affirmative duty to make sure the issuing judge had a "substantial basis" for finding probable cause.[10] In examining the circuit court's ruling, we have an affirmative duty to "review the historical facts for clear error" and to "give due weight to inferences drawn from those facts" by the circuit court, if its decision is supported by substantial evidence.[11] Although Ford engaged in but a minimum amount of independent investigation before seeking the search warrants, he did manage to verify the information Moore had given him. The issuing judge applied the totality of the circumstances test and concluded this was sufficient to find probable cause with respect

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[9] Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 914-915 (1984), quoting Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed.2d 527 at 546-547, 548.

[10] Id.

[11] Stewart v. Commonwealth, supra, quoting Ornelas v. United States, 517 U.S. 690, 698-700, 116 S. Ct. 1657, 134 L. Ed.2d 911 (1996).

to 409 Bristol Road. At the suppression hearing, Ford testified regarding both Moore's information and his investigation to corroborate that information. Given this evidence, the circuit court concluded that the issuing judge had a substantial basis for finding probable cause.

We affirm the circuit court for the following reasons. First, two judges reviewed the affidavit in support of the search warrant for Bristol Road and both concluded that probable cause existed to issue the warrant. Even though the standard of review set forth above allows us to consider the suppression issue *de novo*, it also requires us to review the historical record for clear error and to give due weight to the inferences both judges drew from the facts. After reviewing the historical record, we have found no clear error on either judge's part, and both judges concluded that the facts set forth in affidavit supported a finding of probable cause. Although the question is a close one, giving all due weight to the judges' conclusions and given the lack of any clear error, we conclude that the affidavit was sufficient to support a finding of probable cause.

Second, the exclusionary rule's purpose is to deter and punish police misconduct when the police use deception or reckless action to obtain a search warrant.[12] The rule was never meant to deter or punish judges who erroneously issue defective search warrants.[13] Excluding evidence obtained by a warrant that is

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[12] United States v. Leon, Et Al., 468 U.S. 897,916, 104 S. Ct. 3405, 82 L. Ed.2d 677 (1984).

[13] Id.

defective due to judicial mistake, as opposed to police misconduct, would not promote the exclusionary rule's purpose nor effectively deter future judicial error.[14] If an officer has relied with objective good faith upon a defective search warrant issued by a judge, then any evidence found as result of the proper execution of said defective warrant will not be excluded.[15] This is the good faith exception to the exclusionary rule.

In this case, nothing suggests that Ford acted recklessly or deceived the issuing judge when he obtained the search warrant for 409 Bristol Road; and, Fowler does not allege that Ford engaged in any misconduct to obtain the search warrant nor that the officers who executed it acted improperly. Absent evidence to the contrary, we infer the police acted in good faith reliance when they executed the search warrant at 409 Bristol Road. Therefore, even if Fowler is correct that the affidavit is an insufficient basis upon which to find probable cause, we are compelled by the good faith exception to conclude the circuit court was correct in denying his suppression motion.

In his second assignment of error, Fowler argues that the circuit court erred when it forfeited the money seized from the residence at 2440 Millbrook Drive because it had been illegally seized as the result of a search that was later suppressed. Fowler contends that the circuit court should have denied the Commonwealth' motion to forfeit based on the exclusionary rule set

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[14] Id. at 916-917.

[15] Id. at 920-921.

forth in Mapp v. Ohio.[16] Further, Fowler contends that the money was not connected to any criminal activity nor was it contraband.

Fowler cites One 1958 Plymouth Sedan v. Pennsylvania[17] for the proposition that the exclusionary rule applies to forfeiture proceedings. In that case, two state liquor control board officers stopped a vehicle, conducted a warrantless search and found contraband liquor.[18] The officers arrested the vehicle's owner and seized both the vehicle and the liquor.[19] When the Commonwealth of Pennsylvania sought to forfeit the vehicle, the owner objected to the forfeiture and argued that the forfeiture was dependent upon the admission of evidence seized in violation of the Fourth Amendment.[20] The Pennsylvania Supreme Court allowed the forfeiture.[21] The United States Supreme Court held that the exclusionary rule applied to forfeiture proceedings.[22] The Court reasoned that the vehicle was not contraband *per se*, that is, not illegal by its nature. To be forfeited as contraband, the Commonwealth of Pennsylvania would have had to show that the vehicle had been illegally used. To do that, the Commonwealth would have had to use evidence that had been seized in violation of

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[16] 367 U.S. 643, 6 L. Ed.2d 1081 (1961).

[17] 380 U.S. 693, 14 L. Ed.2d 170 (1965).

[18] Id. at 694.

[19] Id.

[20] Id. at 694-695.

[21] Id.

[22] Id. at 696.

the Fourth Amendment and subsequently suppressed.[23] The Court concluded that

> [i]t would be anomalous indeed . . . to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible.[24]

Thus, the Court concluded that the exclusionary rule should apply to forfeiture proceedings, which are quasi-criminal proceedings that penalize a person for committing a crime.[25]

The Commonwealth argues that Plymouth Sedan is factually distinguishable, thus inapplicable, because the vehicle in Plymouth Sedan was subject to a warrantless search, while Fowler's residence was searched subject to a warrant. The Commonwealth also points out that the good faith exception to the exclusionary rule did not exist when Plymouth Sedan was decided. The Commonwealth contends that the officers relied in good faith upon the search warrant that had been signed by a judge; thus, the money was not illegally seized for forfeiture purposes.

We disagree and concluded that Plymouth Sedan is dispositive. To prove the money had been illegally used or connected to illegal drug activity, the Commonwealth would have been required to introduce the evidence seized from Fowler's home,

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[23] Id. at 699.

[24] Id. at 700-701.

[25] Id.

specifically the drug paraphernalia and marijuana. The circuit court had previously suppressed that search and excluded that evidence. It would be logically inconsistent to exclude the evidence in the criminal proceeding yet admit it in the forfeiture proceeding. The circuit court should have consistently applied the exclusionary rule and excluded the evidence from the forfeiture proceeding. Without that evidence, the Commonwealth could not sustain its burden of proof, and the money would not and should not have been forfeited.

We reverse the circuit court with respect to the forfeiture. However, we order the circuit court to return only $1,400.00, the amount Fowler claimed to be his. Fowler has acknowledged that the remaining money did not belong to him but to Debbie Preston. Neither has he claimed an ownership interest or any other lesser property interest in the remaining money. Therefore, Fowler has no interest in the approximately $6,600.00 that allegedly belongs to Debbie Preston, nor does he have standing before this Court or the circuit court to demand the return of Preston's money.[26] Since Preston is not before this court, we decline to address the issue of the approximately $6,600.00 that allegedly belongs to her.

For the foregoing reasons, we affirm the circuit court in respect to the search of the residence at 409 Bristol Road and affirm Fowler's conviction. However, we reverse the circuit court in respect to forfeiture of the money seized from the residence at

[26] See United States v. $515,060.42 in United States Currency, 152 F.3d. 491 (6th Cir. 1997).

2440 Millbrook Drive and remand this case to the circuit court with instructions to order return of $1,400.00 to Robert Fowler.

ALL CONCUR.

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