RENDERED: DECEMBER 13, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000004-MR

JERRY ALLEN RUNNINGEN — APPELLANT

v.

APPEAL FROM LARUE CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 00-CR-00055

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Jerry Allen Runningen appeals from his conviction of trafficking in marijuana, complicity to possession of drug paraphernalia, and operating a motor vehicle under the influence, pursuant to a conditional guilty plea reserving the right to appeal the denial of a motion to suppress. Having concluded that the affidavit upon which the search warrant was based was sufficient to establish probable cause, we affirm.

On July 28, 2000, Trooper Jeremy Thompson of the Kentucky State Police submitted an affidavit for a search warrant for appellant's home at 2327 Wunderland Road which provided, in relevant part:

> On the 27 day of July 2000, at approximately 1900 [] p.m. affiant received information from/observed: On June 24, 2000 this officer met with persons he knew to be reliable, Jones and Underwood who stated that Runningen on Wunderland Rd. was growing marijuana. They also provided this officer with a list of names they believed to be trafficking marijuana and other controlled substances. On June 30, 2000 this officer arrested two of the subjects on the list provided to him by Jones and Underwood for four separate felony counts of possession of narcotics. On July 27, 2000 this officer listened to an anonymous caller that called Post 4, E-town, KSP, to report that Dennis Asbell was at 2327 Wunderland Rd., at a Jerry Runningen residence purchasing marijuana. This officer was given vehicle information as well as a destination of Asbell. Asbell was stopped pulling from Wunderland Rd. and arrested for possession of marijuana.
>
> Acting on the information received, affiant conducted the following independent investigation: Jerry Runningen resides at 2327 Wunderland Rd. Upton, Ky 42784. This was corroborated by a [sic] operators license check. Jerry Runningen has a 1949 Harley Davidson, black, and a 1981 Honda 4-dr, grey that are registered to him. This was corroborated by a vehicle check. Jerry Runningen has no criminal history pertaining to controlled substances or marijuana trafficking/possession.

Based upon the affidavit, the court issued a search warrant for appellant's residence. While police officers were executing the search warrant, appellant pulled up on a motorcycle. Pursuant to the search warrant, the officers searched appellant's residence and seized marijuana, drug paraphernalia, and a handgun. Thereafter, on September 18, 2000, appellant was indicted for trafficking in marijuana, complicity to commit trafficking in marijuana, possession of handgun while committing offense, complicity to commit possession of handgun while committing

offense, possession of drug paraphernalia, complicity to commit possession of drug paraphernalia, and operating a motor vehicle while under the influence of alcohol.

Appellant moved to suppress the evidence seized pursuant to the search warrant, and a suppression hearing was held on April 2, 2001. Appellant argued that the search warrant was based on an affidavit that was facially insufficient, on grounds including the fact that the stop of Asbell described in the affidavit was later determined to have been illegal.[1]

In an order dated August 11, 2001, and entered August 14, 2001, the trial court denied the motion to suppress. On August 24, 2001, appellant filed a motion to vacate, alter or amend the August 14, 2001, order, and/or make specific findings of fact on various issues. In an order dated September 25, 2001, and entered on September 27, 2001, the court denied appellant's motion, making the following additional findings:

> (1) The Court does not believe or find that the dismissal of the charges against Asbell on constitutional grounds negates consideration of the facts emanating from his visit to the Runningens, including the possession of marijuana, for purposes of issuance of a search warrant. In other words, although Asbell had standing to contest the evidence obtained from him, the Runningens possessed no such standing to object to such evidence within the context of the search warrant affidavit involved herein.
>
> (2) Had the information relating to Asbell's visit to the Runningens and his possession of

[1] The stop of Asbell occurred in Hardin County. On February 1, 2001, the Hardin District Court entered an order finding that the Commonwealth did not have probable cause to stop Asbell, and therefore suppressed the evidence obtained as a result of the stop.

> marijuana shortly after leaving their home not been available to the Court it probably would have found the search warrant affidavit facially deficient.

Subsequently, on October 5, 2001, appellant entered a conditional guilty plea to trafficking in marijuana over eight ounces, complicity to possession of drug paraphernalia, and operating a motor vehicle under the influence, reserving the right to appeal the trial court's denial of his motion to suppress. Appellant was sentenced to a total concurrent sentence of three years' imprisonment. This appeal followed.

We first address appellant's argument as to whether he has standing to object to the use of the evidence obtained pursuant to the illegal stop of Asbell in the affidavit for the search warrant for appellant's residence. Appellant contends that because the stop of Asbell was illegal, that anything flowing from the stop should be suppressed as "fruits of the poisonous tree," and thus, the information relating to the stop of Asbell should not be considered in the affidavit. Although both appellant and the trial court framed the issue in terms of whether appellant had "standing" to object to the use of the Asbell evidence in the context of the affidavit, in Commonwealth v. Bertram, Ky. App., 596 S.W.2d 379, 381 (1980), we stated:

> The United States Supreme Court seems to have discarded the whole concept of "standing" to contest a search and seizure in favor of an inquiry into "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Rakas v. Illinois, 439 U.S. 128, 140, 99 S. Ct. 421, 429, 58 L. Ed. 2d 387 (1978). Put another way, the appropriate inquiry seems to be whether the defendant had an interest in connection with

> the searched premises that gave rise on his part to a reasonable expectation of freedom from governmental intrusion. [citations omitted.]

"'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'" Rakas, 439 U.S. at 133, 99 S. Ct. at 425, quoting Alderman v. United States, 394 U.S. 165, 174, 89 S. Ct. 961, 966-967, 22 L. Ed. 2d 176 (1969).

> A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. Alderman, [] 394 U.S.[] at 174, 89 S. Ct.[] at 966. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct. 613, 619, 38 L. Ed. 2d 561 (1974), it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. [footnote omitted.]

Rakas, 439 U.S. at 134, 99 S. Ct. at 425. Accordingly, as the illegal stop of Asbell did not infringe upon appellant's Fourth Amendment rights, appellant cannot invoke the exclusionary rule with regard to evidence obtained from the stop of Asbell. Id; Bertram, 596 S.W.2d at 381.

Appellant further argues that, either with or without the Asbell evidence being considered, that the affidavit supporting the search warrant was facially defective. In addition to the use of the Asbell evidence, appellant contends that the affidavit was facially invalid on grounds including that it did not identify the location where appellant was growing marijuana and therefore did not establish the place to be

searched with certainty; that the Jones and Underwood information was stale and was not evidence that appellant was growing marijuana; and that the affidavit contained an untrue statement that "Asbell was stopped pulling from Wunderland Rd." when he was actually stopped three-and-a-half miles from Wunderland Road.

The affidavit provided that "Runnigen on Wunderland Rd. was growing marijuana" and that Asbell was at appellant's residence at 2327 Wunderland Rd. purchasing marijuana. Hence, we conclude that the affidavit "reasonably describe[d] the property or premises to be searched." Coker v. Commonwealth, Ky. App., 811 S.W.2d 8, 9 (1991). As to appellant's assertion that the information provided by Jones and Underwood was stale, we believe that time, for the purposes of staleness, is relative to the charge. In the present case, we conclude that the Jones and Underwood information, which was approximately one month old at the time of the issuance of the search warrant, was not stale as related to marijuana growing. Further, with regard to the Jones and Underwood information, we note that an affidavit for a search warrant based on information provided by a named individual is generally sufficient to support the warrant. Embry v. Commonwealth, Ky., 492 S.W.2d 929, 931 (1973); Edwards v. Commonwealth, Ky., 573 S.W.2d 640, 641 (1978). As to the statement that "Asbell was stopped pulling from Wunderland Road," we conclude that while this statement may not have been artfully worded, it was not false or misleading. See Commonwealth v. Smith, Ky. App., 898 S.W.2d 496, 503 (1995). While Asbell was actually stopped a few miles down the road on U.S. 31, Officer

Thompson had initially observed him pulling from Wunderland Road. Accordingly, and in light of our conclusion that the Asbell evidence may be considered with regard to appellant, we consider the affidavit in its entirety.

In Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984), the Kentucky Supreme Court adopted the "totality of the circumstances" test for determining probable cause set forth by the United States Supreme Court in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The magistrate must make a:

> "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and the '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. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed. [citation omitted]."

Beemer, 665 S.W.2d at 914-915, quoting Gates, 462 U.S. at 238-239, 103 S. Ct. at 2332. In the present case, under the totality of the circumstances we conclude that the affidavit established a substantial basis for a finding that probable cause existed. Beemer, 665 S.W.2d at 914-915. Accordingly, the trial court did not err in denying appellant's motion to suppress.

For the aforementioned reasons, the judgment of the Larue Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT: Elizabethtown, Kentucky

Dwight Preston

BRIEF FOR APPELLEE:

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