RENDERED: August 29, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002157-MR

DAVINA JO WHEELER — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 00-CR-00201

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; AND HUDDLESTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Davina Jo Wheeler has appealed from the final judgment and sentence entered by the Boyd Circuit Court on September 28, 2001, following her conditional plea of guilty to the charges of trafficking in a controlled substance within 1,000 yards of a school,[2] selling a controlled substance to a

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Revised Statutes (KRS) 218A.1411.

minor,[3] and trafficking in a controlled substance in the second degree.[4] Having concluded that the trial court properly denied Wheeler=s motion to suppress, we affirm.

On September 8, 2000, at approximately 4:00 a.m., Officer Kenny Diamond of the Boyd County Police Department received information from Jonathan Alexander, who was 16-years old at the time, indicating that he had purchased marijuana from Wheeler at her residence on Bellefonte Road in Ashland, Kentucky, earlier that morning.[5] Shortly thereafter, Officer Diamond prepared a search warrant which described Wheeler=s residence on Bellefonte Road as a place to be searched for marijuana and any items used in the preparation, packaging and sale of marijuana. The search warrant was based on the following affidavit signed by Officer Diamond:

> On the 8 day of September, 2000, at approximately 0401 a.m., affiant received information from Jonathan Matthew Alexander that he had bought marijuana at the above-described residence at approximately 0200 hours this date from Davina Wheeler. Alexander stated he bought a $20 bag and that he, another juvenile and Wheeler had consumed the marijuana. Alexander stated that when [Wheeler] sold him the marijuana, he could hear her filling his [ ] order from a quantity in the back room. Alexander stated that he has bought marijuana from her at this

[3] KRS 218A.1401.

[4] KRS 218A.1413.

[5] The information elicited from Alexander was obtained pursuant to a traffic stop, the validity of which is not subject to collateral attack.

> address over the past year. Based upon the statement of Alexander, Affiant believes that other marijuana my be found in the house, along with evidence of the sale of marijuana. The location is, to the belief of Affiant, within 1,000 yards of Fairview High School.

The affidavit was reviewed by the Boyd District Court judge and the search warrant was signed by the judge on the morning of September 8, 2000. The search was executed at approximately 6:30 a.m. that morning. Chief Paul Helton, Sergeant Steve Sturgill and Officer Tony Moore assisted Officer Diamond with the search. Wheeler was present when the search was conducted and she was read her Miranda[6] rights, after which Officer Diamond claims she admitted to Aselling drugs for about a month.@[7] According to Officer Diamond, Wheeler then directed the officers to her bedroom where several bags of marijuana, an unmarked bottle of pills, and drug paraphernalia were found. Wheeler was subsequently taken to the Boyd County police station where she signed a written statement waving her Miranda rights. Officer Diamond then obtained a sworn statement from Wheeler in which she admitted to transferring marijuana to Alexander, but she denied selling it to him.[8]

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[6] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[7] Officer Diamond attributed this statement to Wheeler in his written report, which was submitted on September 10, 2002.

[8] Wheeler claimed she gave Alexander the drugs and told him, Anot to worry about paying for it, that [she] had some extra marijuana and not to worry about it.@

Wheeler was subsequently indicted by a Boyd County grand jury on November 17, 2000, for trafficking in a controlled substance within 1,000 yards of a school, selling a controlled substance to a minor, and trafficking in a controlled substance in the second degree. On April 5, 2001, Wheeler filed a motion to suppress the evidence seized from her residence arguing that the search was violative of Section 10 of the Kentucky Constitution and the Fourth Amendment to the United States Constitution.[9] A suppression hearing was held on April 17, 2001, and the trial court entered an order denying Wheeler=s motion on April 19, 2001.

On April 27, 2001, Wheeler filed a motion pursuant to RCr[10] 9.78 asking the trial court to enter findings of fact and conclusions of law explaining why her motion to suppress was denied. On May 1, 2001, the trial court entered an order setting forth the following specific findings and conclusions of law:

> A review of the affidavit executed in support of the search warrant reveals a number of facts which the district judge was able to consider. First of all, the alleged sale of marijuana to the juvenile [Alexander] occurred only two hours prior to the officer interviewing the juvenile. The juvenile was

[9] Wheeler also challenged the admissibility of the statements she made to Officer Diamond during the search of her residence and she challenged the validity of Count III of the indictment, (trafficking in a controlled substance in the second degree). More specifically, Wheeler claimed that she was entitled to a hearing on the issue of whether the statements she made to Officer Diamond were obtained voluntarily and she claimed Count III of the indictment was a lesser-included offense of Count I or II.

[10] Kentucky Rules of Criminal Procedure.

> able to describe sufficient details about how the transaction occurred including the back room where the marijuana he purchased had been obtained. The juvenile also made a statement against interest when he acknowledged that he and his friends had consumed marijuana at that time with the defendant. All of these statements by such a young unsophisticated informant were certainly sufficient for the district judge to form a substantial basis for concluding that a search would uncover evidence of a crime.[11]

Wheeler subsequently filed a motion asking the trial court to address (1) whether there was any duty to include in the affidavit the veracity and basis of knowledge of the hearsay information obtained from Alexander; and (2) whether any independent investigation was required of Officer Diamond to corroborate the information provided by Alexander, who the trial court had labeled as an Aunsophisticated informant.@ On May 8, 2001, the trial court denied Wheeler=s motion stating that, Athere was sufficient information before the district judge to allow him to form a substantial basis for concluding that the search would uncover evidence of a crime.@ The trial court further stated that under the totality of the circumstances, Ait was not necessary that any independent corroborating investigation occur prior to issuance of the search warrant.@

[11] The trial court cited Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, reh. den. 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983) and Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), overruled on other grounds, United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), in support of its ruling.

On August 24, 2001, Wheeler entered a conditional guilty plea to the charges contained in the indictment and a final judgment and sentence was entered on September 28, 2001. Wheeler received a prison sentence of five years on her conviction for trafficking in a controlled substance within 1,000 yards of a school, six years on her conviction for selling a controlled substance to a minor, and five years on her conviction for trafficking in a controlled substance in the second degree. The sentences were ordered to run concurrently for a total of six years. This appeal followed.

Wheeler claims the trial court erred by denying her motion to suppress because the police search conducted on September 8, 2000, violated the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution.[12] More specifically, Wheeler claims that the affidavit upon which the search warrant was based did not provide the issuing judge with a substantial basis for concluding that probable cause existed to search her residence. Thus, Wheeler maintains that the items seized during the search should have been suppressed.

[12] We note at the outset that Section 10 of the Kentucky Constitution does not provide any greater protection than the Fourth Amendment. See Colbert v. Commonwealth, Ky., 43 S.W.3d 777, 780 (2001) (citing LaFollette v. Commonwealth, Ky., 915 S.W.2d 747, 748 (1996)).

The proper standard of review was set forth in Commonwealth v. Neal:[13]

> An appellate court=s standard of review of the trial court=s decision on a motion to suppress requires that we first determine whether the trial court=s findings of fact are supported by substantial evidence. If they are, then they are conclusive. RCr 9.78. Based on those findings of fact, we must then conduct a de novo review of the trial court=s application of the law to those facts to determine whether its decision is correct as a matter of law.[14]

The trial court determined in the case sub judice that under the totality of the circumstances the affidavit was sufficient to allow the issuing judge to make a practical determination that a fair probability existed that contraband would be found at Wheeler=s residence. The trial court relied on several factors in arriving at this conclusion: (1) the alleged sale of marijuana had occurred only two hours prior to Officer=s Diamond=s encounter with Alexander; (2) Alexander was able to describe in particularity when and where the transaction took place; and (3) Alexander had made a statement against his penal interest when he admitted to smoking marijuana with Wheeler.[15] Clearly, the trial court=s findings of fact were supported by

[13] Ky.App., 84 S.W.3d 920, 923 (2002).

[14] Id. (citing Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998); and Commonwealth v. Opell, Ky.App., 3 S.W.3d 747, 751 (1999)).

[15] The trial court did not mention that Alexander stated that he had bought marijuana from Wheeler at this address over the past year.

substantial evidence. The critical issue is Awhether the rule of law as applied to the established facts is or is not violated.@[16]

In Kentucky, the probable cause inquiry is limited to the affidavit supporting the search warrant.[17] In testing the sufficiency of an affidavit, the Supreme Court of Kentucky has adopted the Atotality of the circumstances@ approach set forth in Gates.[18] In Gates, the two-pronged test of Aguilar v. Texas,[19] and Spinelli v. United States,[20] was replaced by the less-stringent Atotality of the circumstances@ evaluation.[21] Under this standard, an issuing judge is required to examine the Atotality of the circumstances@ as set forth in the affidavit to determine whether, Athere is a fair probability that contraband or evidence of a crime will be found in a particular place.@[22] In a case involving hearsay information, the veracity and basis of knowledge of the person supplying the hearsay information plays an important role in this analysis. Nonetheless, when reviewing

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[16] Adcock, 967 S.W.2d at 8 (quoting Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

[17] Robinson v. Commonwealth, Ky., 550 S.W.2d 496, 497 (1977) (citing Caslin v. Commonwealth, Ky., 491 S.W.2d 832, 834 (1973); and Bowen v. Commonwealth, Ky., 251 S.W. 625 (1923)).

[18] Gates, 462 U.S. at 238. (adopted for purposes of the Kentucky Constitution in Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 914 (1984)).

[19] 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 273 (1964).

[20] 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

[21] Gates, supra.

[22] Id. See also Commonwealth v. Hubble, Ky.App., 730 S.W.2d 532, 534 (1987) (citing Beemer, supra).

the sufficiency of a search warrant affidavit, we must bear in mind that the role of an appellate court is, Asimply to ensure that the issuing [judge] had a substantial basis for concluding that probable cause existed.@[23]

In the case sub judice, Wheeler claims the affidavit upon which the search warrant was based did not contain any evidence of Alexander=s veracity or any evidence supporting the basis of his knowledge. Thus, Wheeler maintains that the information contained in the affidavit failed to establish a substantial basis for the issuing judge to conclude that probable cause existed to search her residence. The Commonwealth, however, argues that since Alexander was a named informant, hearsay can provide the basis for probable cause to search without any specific showing of Alexander=s veracity. The Commonwealth further argues that the incriminating nature of the information provided by Alexander provides a valid reason for accepting his statements as truthful.

In Hubble, this Court was presented a case similar to the case at bar. The affidavit in Hubble was based on hearsay information obtained from Travis Evans and his wife Linda, both of whom had confessed to several burglaries. Travis informed the affiant, who was a police officer, that he had traded stolen goods with Hubble, and that he had purchased cocaine from Hubble

[23] Hubble, 730 S.W.2d at 534.

at his residence in Graves County. Linda informed the officer that she had been at Hubble=s residence the previous week and had observed mass quantities of illegal drugs on the premises. Linda also informed the officer that she had seen Hubble hiding drugs in his utility room.[24] Based on this information, the district judge signed a search warrant authorizing the search of Hubble=s residence. A search was conducted and evidence of criminal activity was found at Hubble=s residence. Hubble subsequently filed a motion to suppress and the trial court determined that suppression of the evidence was required.[25]

This Court disagreed and concluded that the affidavit was sufficient to provide the issuing judge with a substantial basis for concluding that probable cause existed to search Hubble=s residence. In arriving at this conclusion, this Court focused on the fact that the Evanses were both named informants. This Court went on to hold that when an informant=s name is given, hearsay can provide the basis for probable cause to search without any showing of a named informant=s reliability.[26] In addition, this Court also concluded that A[t]he fact that the

[24] Hubble, 730 S.W.2d at 533.

[25] Id.

[26] Id. at 534 (citing Embry v. Commonwealth, Ky., 492 S.W.2d 929 (1973); and Edwards v. Commonwealth, Ky., 573 S.W.2d 640 (1978)).

information given by the Evans[es] was against their penal interest, is reason to accept it as truthful.@[27]

Wheeler attempts to distinguish Hubble on the facts. Wheeler argues that the information proved by Alexander is not as specific or as detailed as the information provided by the informants in Hubble. Moreover, Wheeler argues there is no evidence indicating the basis of Alexander=s knowledge, as there was in Hubble. We disagree with both of Wheeler=s contentions.

According to the affidavit, Alexander informed Officer Diamond that he had recently, Abought a $20 bag@ from Wheeler and that he, Acould hear her filling his [ ] order from a quantity in the back room . . . .@ The affidavit also stated that Alexander informed Officer Diamond that he had recently consumed marijuana with Wheeler at her residence. According to Alexander, these events took place approximately two hours prior to his encounter with Officer Diamond. Furthermore, the affidavit stated that Alexander informed Officer Diamond that he had purchased marijuana from Wheeler at her residence in the past. In addition, the affidavit contained information pertaining to the location of the drugs, i.e., Ain the back room,@ much in the same way the affidavit in Hubble contained a description of where the drugs were located, i.e., Ain the utility room.@ Thus, we conclude that the information provided by Alexander was

[27] Id. (citing United States v. Harris, 403 U.S. 573, 583, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971)).

sufficiently detailed to provide the issuing judge with a substantial basis for concluding that probable cause existed to search Wheeler=s residence. Similarly, we conclude that the basis of Alexander=s knowledge was clearly indicated on the face of the affidavit.

Wheeler also attempts to distinguish Hubble on the ground that the information provided by Alexander was not corroborated by any showing of his veracity. Wheeler claims that Alexander=s statements should be viewed as unreliable due to the fact he, Awas scared out of his wits and may have been willing to say anything to get out of trouble.@ This argument appears to be premised on Wheeler=s contention that the statements made by Alexander were not actually against his penal interest, as were the statements made by the informants in Hubble. This argument is apparently based on the mistaken belief that the mere purchase or consumption of marijuana, in and of itself, does not establish a crime.[28] This argument contains a critical flaw, however, as the relevant inquiry is not whether Alexander=s statements were in fact against his penal interest, but rather, whether the

[28] Wheeler claims the record is devoid of any evidence indicating that Alexander was found to be in the possession of any marijuana. Interestingly enough, we found the following statement contained in her motion to suppress, AHere, we have a sixteen-year-old kid caught with a bag of pot in the middle of the night by a badge wearing, gun toting policeman.@ Apparently, Wheeler has changed her position on appeal and now seeks to argue that Alexander did not have any marijuana in his possession when he was questioned by Officer Diamond.

underlying circumstances showed that the informant's information was reliable.

As Professor Wayne R. LaFave suggests in Search and Seizure, A[a]lthough it is the Harris admission-against-penal-interest technique which has received frequent attention in the appellate decisions, it must be remembered that the fundamental inquiry is whether the underlying circumstances show that the informant=s information is >reliable.=@[29] Reliability in this regard can be demonstrated in a number of ways as the focus of the inquiry is on the informant=s motivation for supplying the information. It necessarily follows that consideration may be given to any circumstance which suggests the probable absence of any motivation to falsify.

In the case sub judice, Alexander was pulled over pursuant to a valid traffic stop. After being questioned by Officer Diamond, he stated that he had recently smoked marijuana with Wheeler and that he had purchased marijuana from her earlier that morning. Alexander also stated that he had purchased marijuana from Wheeler at her residence in the past year. Alexander=s conversation with Officer Diamond took place only two hours after the alleged sale of marijuana took place. Under these circumstances, we simply cannot conclude that the trial

[29] See Wayne R. LaFave, Search and Seizure, Vol. II, Chap. 3, ' 3.3(c), p. 136 (3d ed. 1996). The AHarris admission-against-penal-interest technique@ is a reference to United States v. Harris, 403 U.S. 573, 583, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971).

court erred by determining that Alexander had no motive to lie or to mislead the police. Certainly, sending the police on a fruitless search would not have benefitted his cause. Furthermore, a person=s willingness to give his name on the face of the affidavit demonstrates his willingness to stand behind his story. Thus, the circumstances surrounding the statements made by Alexander to Officer Diamond support the reliability of those statements. To hold otherwise would constitute a clear departure from a well-established principle in favor of securing search warrants. As was stated by the former Court of Appeals in Embry, A[i]n the interest of law enforcement,[ ] the securing of warrants should be encouraged and not discouraged by hypertechnical mouse-tracking of the language of the affidavit on which the warrant is based.@[30]

Moreover, even if we were to conclude that the affidavit did not provide the issuing judge with a substantial basis for concluding that probable cause existed to search Wheeler=s residence, we would uphold the search under the Agood-faith exception@ to the exclusionary rule created in United States v. Leon,[31] and adopted by the Supreme Court of Kentucky in Crayton v. Commonwealth.[32] In Leon, the Supreme Court of the

[30] Embry, 492 S.W.2d at 932. See also Edwards, 573 S.W.2d at 641.

[31] 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

[32] Ky., 846 S.W.2d 684 (1992).

United States held that the exclusionary rule Ashould be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective.@[33] Only where the evidence is Aso lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,@ will the evidence be suppressed.[34] There is nothing in Officer Diamond=s affidavit that suggests it was wholly deficient. Similarly, Officer Diamond=s reliance on the search warrant could not be said to be Aentirely unreasonable.@ The probable cause decision was properly submitted to the district court judge, Awho by longstanding Fourth Amendment doctrine is viewed as the preferred decisionmaker on the probable cause issue. . . .@[35]

Accordingly, the trial court properly denied Wheeler's motion to suppress and the judgment and sentence of the Boyd Circuit Court is affirmed.

ALL CONCUR.

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[33] Leon, 468 U.S. at 905.

[34] Id. at 923.

[35] LaFave, supra at 88.

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