RENDERED: NOVEMBER 26, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-002253-MR

JOSEPH E. PORTER,
A/K/A JOED PORTER — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 01-CR-00146

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: BAKER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Joseph Porter appeals from a judgment of the Rowan Circuit Court, entered October 18, 2002, convicting him of first-degree trafficking in a controlled substance (cocaine),[1] possession of marijuana,[2] and possession of drug paraphernalia,[3]

[1] KRS 218A.1412.

[2] KRS 218A.1422.

all while in possession of a firearm.[4] He was sentenced to concurrent terms of imprisonment totaling ten years. Porter contends that the trial court erred by admitting evidence derived from an illegal search, by admitting expert testimony for which there was an inadequate foundation, and by denying his motion for a directed verdict. None of these alleged errors entitles Porter to relief.

At about eleven o'clock on the evening of November 9, 2001, Karen LaBraun telephoned the Morehead Police Department from a local Days Inn and reported her suspicion that the man with whom she was traveling, Oscar Guerrero, was involved in drug trafficking. The police investigated and discovered several ounces of cocaine in the trunk of LaBraun's vehicle. They arrested Guerrero and apparently both he and LaBraun gave statements to the effect that earlier that evening Guerrero had left cocaine with Joseph Porter at his apartment. On the basis of LaBraun's statement, the officers obtained a search warrant for Porter's residence and executed it forthwith, at about four-thirty a.m. on November 10, 2001. In Porter's apartment the police found about five ounces of cocaine, a small quantity of marijuana, electronic scales, and two handguns.

---

[3] KRS 218A.500.

[4] KRS 218A.992.

At trial, the investigating officers testified to this chain of events and, in addition, a friend of Porter's, who had been visiting him at the time, testified that Guerrero and a woman had indeed come to Porter's apartment the afternoon of November 9, 2001, and that Guerrero had asked Porter to keep some cocaine for delivery to a third person. Porter first contends that the trial court should have suppressed the evidence gathered during the search of his apartment because the affidavit the officers submitted with their request for the search warrant did not establish probable cause.

After identifying Porter's apartment as the place to be searched, the affidavit continued as follows:

> On the 9th day of November, 2001, at approximately 11:00 p.m. affiant received information from/observed: a[n] informant told MPD that Oscar Guerrero, a resident of Ciscero, Ill., came to Morehead, delivered 5 bags of crack cocaine to Joe Ed Porter's apartment at 211 Rowan, Morehead, Ky., and left 1 bag of crack cocaine in the trunk of his car, a blue Lincoln Continental (1979). The car was parked at the parking lot of the Days Inn motel, in Morehead, Ky. The above informa[nt] had personal knowledge of transaction and assisted Oscar Guerrero in the execution of the transaction, which was unknown to her.
>
> Acting on the information received, affiant conducted the following independent investigation: Called the Ciscero, Ill., police Dept. who informed MPD the Guerrero family has history of drug dealing. MPD obtained a U.S. Forest Service drug dog, who indicated drugs were in the trunk of the

> blue Lincoln Continental. Mr. Guerrero gave permission to the MPD to search his car. MPD found a bag of crack cocaine in the automobile.

In deciding whether to issue a search warrant, the issuing magistrate is to "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."[5] When the affidavit is based on information learned from an informant, the "informant's veracity, reliability, and basis of knowledge are all relevant considerations in the totality of the circumstances analysis, [but] they are not conclusive and a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."[6] Typically, as Porter notes, a bare and uncorroborated tip from a confidential informant will not establish probable cause for a search warrant.[7]

---

[5] Lovett v. Commonwealth, Ky., 103 S.W.3d 72, 77-78 (2003) (citing Illinois v. Gates, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983); internal quotation marks omitted).

[6] *Id.*

[7] Florida v. J.L., 529 U.S. 266, 146 L. Ed. 2d 254, 120 S. Ct. 1375 (2000).

In this case, however, there was much more than a bare and uncorroborated tip. The informant was not anonymous. By the time the police applied for the warrant, they had interviewed the informant, a concerned citizen, face-to-face. Their estimate of her reliability, therefore, was based on more than the initial anonymous phone call. Furthermore, the informant's allegations were based on observation, not hearsay, and the officers independently discovered that Guererro had been linked with drug dealing and confirmed the allegation that his car contained cocaine. We agree with the trial court that these facts provided a substantial basis for the magistrate's conclusion that the informant's other allegations were reliable and that the police would likely find contraband in Porter's apartment.

Porter also complains that the affidavit did not specify when the alleged delivery to his apartment had taken place and thus gave the magistrate no reason to conclude that the informant's allegations were not stale. We disagree. The affidavit makes clear that the police acted promptly on the tip and found cocaine in Guererro's car within a few hours of applying for the warrant. A fair reading of the affidavit indicates that the informant's visit to Porter's apartment took place shortly before she made her call.

To be sure, the better practice would have been for the affidavit to include the time of the informant's alleged observations as well as the time she contacted the police, but, as the trial court noted, our Supreme Court has held that this sort of defect in a warrant application does not justify suppressing evidence unless the affidavit was false or misleading or was so lacking in indicia of probable cause that it suggests either a magistrate who has abandoned his or her detached and neutral role or officers who could not but know that their reliance on the warrant was unreasonable.[8]

The affidavit in this case was not false or misleading, and we agree with the trial court that it was not so defective in establishing timeliness as to suggest a lack of good faith by either the magistrate or the officers. The trial court did not err, therefore, by denying Porter's motion to suppress evidence gained during the search of his apartment.

Porter next contends that the trial court should have excluded the opinion testimony offered by Thomas Morrow, a lab supervisor and drug chemist for the State Police. Morrow testified that in his opinion the substances seized from Porter's apartment were in fact cocaine and marijuana. At no point was Morrow asked about his training and experience, so

[8] Commonwealth v. Litke, Ky., 873 S.W.2d 198 (1994); Crayton v. Commonwealth, Ky., 846 S.W.2d 684 (1992).

Porter maintains that the trial court had no basis for deeming him qualified to offer an expert's opinion. Again, the better practice, clearly, would have been for the Commonwealth to elicit brief testimony concerning Morrow's qualifications, but under KRE 702, the trial court has discretion to admit expert testimony when it determines that the expert's opinions will be reliable enough and relevant enough to aid the jury.[9] We are not persuaded that the trial court abused its discretion in this instance. The drug tests underlying Morrow's testimony are routine for persons in his position, and thus it could reasonably be inferred that Marrow conducted them and interpreted the results accurately. Were there reasons to doubt Morrow's competence or the reliability of the results in this case, Porter was free to explore them during cross-examination. Apparently there were none. Although we would urge the Commonwealth to duly qualify its expert witnesses, its failure to do so here does not entitle Porter to relief.

Finally, Porter contends that another lapse in the Commonwealth's proof entitled him to a directed verdict. As noted above, several witnesses testified that Guerrero delivered cocaine to a Joseph, or Joe Ed, Porter's apartment in November 2001 and that the police essentially caught Porter red-handed.

[9] Goodyear Tire and Rubber Company v. Thompson, Ky., 11 S.W.3d 575 (2000).

At no time, however, did anyone testify expressly that the Joe Ed Porter who was arrested in November 2001 was the same person as the Joe Ed Porter standing trial. As Porter notes, an in-court identification of the accused is an essential element in the establishment of guilt beyond a reasonable doubt.[10] Several courts have held, however, that identification may be inferred from all the facts and circumstances that are in evidence, including the fact that no witness points out that the wrong person has been brought to trial, and, on the contrary, that reference is plainly made to the defendant as the person involved in the wrong-doing.[11] We think this rule is sound.

In this case the testimony of Porter's friend is particularly potent circumstantial evidence of Porter's identification. Were there any doubt that the Porter on trial was the same person caught by the police in possession of cocaine, this witness, surely, would have raised it. She did not, however, and because she did not the jury could reasonably infer that the two persons were the same. The trial court did

[10] United States v. Weed, 689 F.2d 752 (7th Cir. 1982).

[11] Brooks v. United States, 717 A.2d 323 (D.C. 1998) (collecting cases); United States v. Alexander, 48 F.3d 1477 (9th Cir. 1995); United States v. Weed, *supra.*

not err, therefore, when it denied Porter's motion for a directed verdict.[12]

In sum, although Porter has identified imperfections in the prosecution of his case, his right is to a fundamentally fair prosecution, not a perfect one. The warrant application, the questioning of Thomas Morrow, and Porter's in-court identification all could have been better. As they were, however, they satisfied Porter's right to a fundamentally fair process. Accordingly, we affirm the October 18, 2002, judgment of the Rowan Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

George C. Howell
Ashland, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Janine Coy Bowden
Assistant Attorney General
Frankfort, Kentucky

[12] Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).