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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001205-MR

JOSEPH FOX

APPELLANT

APPEAL FROM HENDERSON CIRCUIT COURT
v. HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 02-CR-00109

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: This appeal is from a judgment entered by the Henderson Circuit Court after appellant, Joseph Fox, entered a conditional guilty plea to trafficking in more than eight ounces but less than five pounds of marijuana, first degree possession of a controlled substance, and possession of drug paraphernalia, all while in possession of a firearm. The court sentenced Fox in accordance with the jury's recommendation of seven years on each of the first two counts and five years on the third count, with the sentences to be served concurrently. We affirm.

In February 2002, in connection with an ongoing methamphetamine investigation, the Henderson Police Department arrested Bobby Simpson, who told police that Fox was his supplier. In connection with the suppression hearing in the case, the trial court entered an order on April 21, 2003, which included the following extensive findings of fact and conclusions of law:

As part of an extended methamphetamine investigation, Det. Jamie Duvall arrested Bobby Simpson on February 19, 2002. During questioning, Simpson told Duvall that Joseph Fox was his methamphetamine supplier. He said that the buys took place at Fox's home, that he had bought one ounce on February 16, 2002 (three days before), and that he had paid Fox \$3700 on February 18, 2002, for prior and future purchases of drugs. Duvall knew Fox's name from prior investigations. Fox's home had been under police surveillance before, and Duvall had discussed Fox's selling methamphetamine out of his home with Deputy Bill Mills of the Henderson County Sheriff's Office. Deputy Mills and the ATF had also been working with Joe Fox as a confidential informant. Fox made at least one controlled buy for the ATF.

Duvall then conferred with Assistant County Attorney Sheila Nunley-Farris. Ms. Farris advised Duvall that a search warrant was authorized. An affidavit was prepared. Duvall swore to the affidavit in front of District Judge Robert Wiederstein. Judge Wiederstein signed the warrant. The warrant was executed at Fox's home on February 19, 2002.

Both the affidavit and the warrant have been introduced as Commonwealth's Exhibit A.

There are two obvious errors in the affidavit. Det. Duvall testified that the methamphetamine sale occurred on February 16, 2002. The affidavit states that the sale happened on October 17, 2002, a date some seven months after the affidavit was signed. The affidavit also states that the \$3700 payment took place on February 19, 2002, not February 18, 2002.

The search of Fox's home led to the present indictment. Fox is currently charged with Trafficking in Marijuana, First Degree Possession of a Controlled Substance, and Possession of Drug Paraphernalia. The results of the search also led Duvall to believe he should question Simpson again. In Simpson's second interview, he admitted that Joe Fox was not really his methamphetamine supplier but in fact supplied him with marijuana. Simpson stated that he and Fox would trade methamphetamine for marijuana and that this exchange would take place through an intermediary, Christina Lacer. Simpson said that Eddie Kellogg was his real source of methamphetamine. At the evidentiary hearing, Simpson testified that he had never met Fox until after the February 19, 2002, arrest; he lied about Fox because he was scared. Simpson was on parole when he was arrested.

The defendant argues that the affidavit and the resulting warrant in this case are insufficient because Duvall knew that Bobby Simpson had reason to lie to him (making that part of the affidavit suspect) and that there are other, obvious inaccuracies in the affidavit. Both parties have agreed that the Commonwealth bears the burden of proof as to the validity of the warrant. [fn 1] [*But see, Lumpkins v. Commonwealth, Ky., 425 S.W.2d 535 (1968).*] Review of applicable case law indicates that this burden has been met.

There are indeed incorrect statements in the affidavit concerning the dates these events occurred. However, these inaccuracies do not impair the affidavit as a whole. Even if an affidavit contains incorrect information, it is still sufficient if the correct statements support a finding of probable cause. *United States v. Clemens*, 58 F.3d 318, 320 (7th Cir. 1995). In order for an affidavit to be sufficient it must show, under the "totality of the circumstances," a fair probability that a crime has occurred. *Illinois v. Gates*, 462 U.S. 213 (1983).

Although Simpson lied about Fox's being his methamphetamine supplier, Det. Duvall's reliance on Simpson's information in seeking a warrant was not unreasonable under the circumstances. Simpson had just been arrested with a substantial amount of methamphetamine in his apartment; he had a basis for knowing where the drugs came from. Simpson's statement that Fox provided him methamphetamine was also consistent with Duvall's information from Deputy Mills that Fox had sold methamphetamine from his home in the past. This information was also contained in Duvall's affidavit. The affidavit taken as a whole provides a substantial basis for a finding of probable cause. *Gates*, at 230-32.

Even if there were no probable cause to support the warrant, the Commonwealth has shown that the police relied on its issuance in good faith. *United States v. Leon*, 468 U.S. 897 (1984). Deficiencies in the dates in the affidavit were minor and did not destroy Det. Duvall's good faith reliance. *Commonwealth v. Opell*, Ky.App., 3 S.W.3d 747 (1999). Duvall's reliance on the warrant was not otherwise unreasonable. First, the warrant had been signed by a neutral judge. An officer cannot readily be expected to discredit a judge's determination of probable cause. Second, Duvall testified

that he relied on the advice of the Assistant County Attorney Sheila Nunley-Farris in seeking a warrant. In *Crayton v. Commonwealth*, the Kentucky Supreme Court applied the good faith exception where a police officer "sought and obtained the assistance of the county attorney and otherwise acted in good faith with respect to his efforts to obtain a search warrant." Ky., 846 S.W.2d 684, 689 (1992); see also, *United States v. Mendonsa*, 989 F.2d 366 (9th Cir. 1992).

Therefore, the Defendant's Motion to Suppress is OVERRULED.

Our standard of review is set forth in *Commonwealth v. Neal*, Ky. App., 84 S.W.3d 920, 923 (2002), which requires that "we first determine whether the trial court's findings of fact are supported by substantial evidence." If the findings of fact are supported by substantial evidence, we must "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." *Id.* See also *Davis v. Commonwealth*, Ky. App., 120 S.W.3d 185, 189 (2003). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, Ky., 976 S.W.2d 409, 414 (1998) (citations omitted). Further, "due regard shall be given to the

opportunity of the trial court to judge the credibility of the witnesses." CR 52.01.¹

Fox argues that no substantial evidence supported the trial court's finding that Simpson informed Detective Duval that the alleged February 16, 2002, methamphetamine sale took place at Fox's home at 420 Herron Avenue in Henderson. However, Deputy Sheriff Bill Mills testified that Fox told him several times that drug sales took place at Fox's house, and Mills relayed this information to Duval. Further, in response to questioning, Simpson told Duval that his purchases from Fox took place at Fox's house. Only after the search did Simpson admit he did not know where Fox lived.

As found by the trial court, two dates in the affidavit supporting the search warrant were incorrect. One, a date some eight months in the future, was an obvious typographical error. The other date was simply one day off the actual day of the transaction. These mistakes were clearly not sufficiently misleading to require suppression. See *Crayton v. Commonwealth*, Ky., 846 S.W.2d 684, 688 (1992) (suppression required if affidavit was untrue, misleading or deceitful, but not if affidavit was made in good faith).

¹ CR 52.01 is applicable to criminal proceedings by virtue of RCr 13.04.

The testimony addressed at the suppression hearing was sufficient to support the factual determinations by the trial court.

In determining probable cause for a search, a court must examine the "totality of the circumstances" set forth in the affidavit to determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983) (adopted for purposes of the Kentucky Constitution in *Beemer v. Commonwealth*, Ky., 665 S.W.2d 912, 914 (1984)). See also *Commonwealth v. Smith*, Ky.App., 898 S.W.2d 496, 503 (1995). A court reviewing the issuance of a search warrant must examine whether the issuing judge had a substantial basis for concluding that a search would uncover evidence of wrongdoing. *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527, 547 (1983). A magistrate's ruling on probable cause should be afforded great deference by reviewing courts. *Id.*, citing *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 216 L.Ed.2d 637 (1969). In addition, probable cause is a "fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. at 232. An issuing magistrate has the discretion to draw

reasonable inferences from the material supplied by applicants for a warrant. The affidavit in support of a search warrant "should be examined under a common sense approach and not in a hypertechnical fashion." *United States v. Williams*, 10 F.3d 590, 593 (8th Cir. 1993).

Here, Duval presented the district judge with an affidavit attesting that he had arrested Simpson with a large quantity of methamphetamine, and that Simpson had informed Duval that he recently had purchased the drug from Fox. The affidavit further related that Simpson said that he had been buying from Fox for several months and that Fox lived at 420 Herron Avenue.² Moreover, the affidavit related Duval's personal knowledge that Fox lived on Herron Avenue, and his knowledge that Fox told members of the Henderson County Sheriff's Department that he had sold drugs from this location. Based on the totality of the circumstances as presented in the affidavit, "a fair probability" existed that contraband or evidence of a crime would be found at 420 Herron Avenue.

Fox relies on *State v. Silvestri*, 136 N.H. 522, 618 A.2d 821 (1992), for the proposition that the fact that an individual traffics in drugs does not in and of itself provide

² The testimony presented at the suppression hearing was that Simpson lied about Fox being his source and that Simpson did not know where Fox lived. However, the testimony further indicated that Simpson identified Fox's place of residence as Herron Avenue in response to a leading question by Duval.

probable cause to search that person's residence. However, the *Silvestri* affidavit merely recounted the facts of a drug sale/purchase with no information tying any drug transaction to the defendant's house. Here, by contrast, the instant affidavit presented not only a drug transaction, but also Fox's admission that he had sold drugs at his residence. We believe the affidavit established the requisite nexus between Fox's residence and his drug-dealing activities.

The judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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