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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002328-MR

JOEL MCDONALD — APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CR-00159

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: SCHRODER, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a judgment entered by the Marshall Circuit Court after a jury convicted appellant Joel McDonald of cultivation of marijuana, trafficking in marijuana, and use of drug paraphernalia. McDonald contends that the trial court erred by failing to declare a mistrial after a witness testified that McDonald made an incriminating oral statement which was not provided to him during discovery, and by failing

to conduct a suppression hearing after he challenged the validity of a search warrant. We disagree and therefore affirm.

In August 2001 thirty-three marijuana plants were found growing in a field during air surveillance activities conducted by the Kentucky State Police as part of a marijuana eradication program. A motion-sensitive camera, which was set up to covertly record activity in the field, produced a videotape showing a person tending to the plants at 7:54 a.m. on August 24, 2001. Detective Russ Kegel testified below that after viewing the videotape, he thought the person on the tape looked very familiar, and that he looked like McDonald. Subsequently, when employees' names were gathered from McDonald's employer as part of another investigation, Kegel learned that McDonald worked at a location close to the marijuana patch.

On October 2, 2001, Kegel filed an affidavit seeking a warrant to search McDonald's residence based on his observations of the videotape which allegedly showed McDonald

> in the immediate area viewing and tending to a number of marijuana plants. During this time Joel McDonald was clothed in black sneakers with white soles and a tan/gray button down work-type shirt. Mr. McDonald resides at the above-named address where he returns each day after work.

The requested search warrant was issued and executed on that same date. During the ensuing search of McDonald's residence,

law enforcement officials recovered from various rooms a total of 3.7 pounds of marijuana in various stages of processing, as well as drug paraphernalia and firearms.

After a trial a jury found McDonald guilty of cultivation of marijuana, trafficking eight ounces or more of marijuana while in possession of a firearm, and possession of drug paraphernalia. In accordance with the jury's recommendation, the court sentenced him to a total of ten years' imprisonment. This appeal followed.

McDonald first contends that the trial court erred by failing to declare a mistrial after Kegel testified regarding an unrecorded incriminating oral statement which allegedly was made by McDonald but not provided to him during discovery. We disagree.

RCr 7.24(1) provides that "[u]pon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness" (emphasis added). Further, RCr 7.24 consistently has been interpreted as applying only to written or recorded statements, and not to unrecorded oral statements.[1]

[1] *See, e.g., Mathews v. Commonwealth,* 997 S.W.2d 449 (Ky. 1999), *overruled on other grounds by Hayes v. Commonwealth,* 58 S.W.3d 879, 882 (Ky. 2001); *Partin*

Here, in accordance with RCr 7.24, the trial court entered a discovery order requiring the Commonwealth "[t]o disclose the substance of any oral incriminating statement known by the Commonwealth's Attorney to have been made by the defendant to any witness." However, the record shows that both the Commonwealth and McDonald were surprised at trial by Kegel's statement that, when served with the search warrant, McDonald stated "if you come to my house, you're going to find marijuana." McDonald objected to Kegel's statement and moved for a mistrial, but the Commonwealth's Attorney asserted that she did not have a verbatim record of the alleged statement. Further, in chambers the Commonwealth's Attorney stated that "honest to God, I didn't know anything about [the statement] until today," and both McDonald and the court assured her that they did not think otherwise. As it is clear from the trial videotape that there was no real dispute that the Commonwealth's Attorney was unaware of McDonald's statement until it was repeated at trial, and that such statement was oral rather than written or otherwise recorded, the trial court did not err by finding that there was no violation of RCr 7.24 disclosure requirements, and by failing to declare a mistrial on this ground.

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v. Commonwealth, 918 S.W.2d 219 (Ky. 1996); *Berry v. Commonwealth,* 782 S.W.2d 625 (Ky. 1990).

Next, McDonald contends that the trial court erred by failing to conduct a suppression hearing after he challenged the validity of a search warrant. We disagree.

McDonald states on appeal that the thrust of his suppression motion was "his belief that the police did not have probable cause to obtain a search warrant." However, our review of the suppression motion shows that it in fact turned on McDonald's assertion that the search warrant was issued in bad faith, entitling him to an evidentiary hearing under *Franks v. Delaware.*[2] In *Franks,*[3] the United States Supreme Court addressed the manner in which a trial court should respond to an allegation that a false statement was knowingly and intentionally, or recklessly, included in an affiant's search warrant affidavit, and stated:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or

[2] 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

[3] 438 U.S. at 171-72, 98 S.Ct. at 2684.

> otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Although great deference is accorded to a trial judge's determination of probable cause in issuing a warrant, such deference

> does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar v. Texas, supra,* 378 U.S., at 111, 84 S.Ct., at 1512. See *Illinois v. Gates, supra,* 462 U.S. at 239, 103 S.Ct. at 2332. A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 326-327, 99 S.Ct. 2319, 2324-2325, 60 L.Ed.2d 920 (1979). (Footnotes omitted.)

United States v. Leon.[4]

Here, McDonald claims that before the search warrant was issued, law enforcement officials obtained his name from an employee list procured as part of another ongoing investigation, and Kegel recognized his name because they had attended the same high school, because of a prior confrontation between Kegel and McDonald's brother, and because Kegel twice before had pulled McDonald over for driving violations. According to McDonald, since "Kegel and other law enforcement officials were able to obtain a list of employees from" McDonald's employer, they also had the ability to obtain work records to confirm that he was at work rather than in the marijuana patch during the time portrayed in the videotape. McDonald asserted that Kegel was the only officer who positively identified him from the videotape, that such identification occurred only after McDonald's name was obtained from his employer, and that the clothing described in the search warrant affidavit could be found in the wardrobe of "most any average man." More specifically, McDonald asserted:

> 4. Investigating officers knew or should have known that at the date and time a suspect was videotaped "tending" marijuana patch in the river bottoms, the defendant Joel McDonald was at work and wearing steel-toed shoes as required at his work place.

[4] 468 U.S. 897, 914, 104 S.Ct. 3405, 3416, 82 L.Ed.2d 677 (1984).

> 5. It is defendant's averment that . . . Kegel applied for search warrant of defendant's home in bad faith and knew at the time that he applied for the search warrant that the suspect seen on video tape "tending" marijuana crops in the river bottoms was not Joel McDonald. Further Kegel knew or should have known that Joel McDonald was at work and required to wear steal-toed [sic] shoes at work at the time a suspect was video taped by surveillance camera tending marijuana crops in a field in tennis shoes.

The trial court denied McDonald's motion without conducting an evidentiary hearing, stating simply that "the allegations made in the motion do not support that the officer acted in bad faith."

Contrary to McDonald's assertion, there is nothing in the record to support a finding that the search warrant was based on an affidavit which contained deliberate or reckless falsehoods. *See Franks.*[5] Although McDonald claims that Kegel was "able" to obtain work records which would show that he was at work on August 24, 2001, there is nothing in the record to indicate that Kegel ever had access to such information. In any event, during the trial a witness confirmed that although the employer's records did show that McDonald worked three hours on August 24, 2001, those hours were unspecified in the records and it could not be determined whether McDonald was at work during

[5] 438 U.S. 154, 98 S.Ct. 2694.

the time portrayed in the videotape. Thus, there is no merit to McDonald's contentions that the Commonwealth acted in bad faith by accusing him of being the person in the videotape during hours when his employer's records could have established that he was at work, or that probable cause did not support the search because Kegel's identification of McDonald was deficient. It follows that the trial court did not err by denying McDonald's motion to conduct a suppression hearing.

Finally, we are not persuaded by McDonald's claim that he was entitled to a mandatory hearing under RCr 9.78, which requires a trial court to conduct an evidentiary hearing if, before trial, a defendant moves to suppress evidence consisting of an incriminating statement or "the fruits of a search." Not only was this specific issue not raised below but, more important, the issue of whether the search warrant itself was validly issued does not constitute an RCr 9.78 determination herein. *Cf. Lovett v. Commonwealth.*[6]

The court's judgment is affirmed.

ALL CONCUR.

[6] 103 S.W.3d 72 (Ky. 2003).

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