

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000119-MR

JASON GARBER

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
INDICTMENT NO. 04-CR-00085

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND HENRY, JUDGES.

HENRY, JUDGE: Jason Garber appeals from the Graves Circuit Court's judgment sentencing him to ten years imprisonment following entry of a conditional guilty plea. Garber contends that the trial court erred in failing to grant his motion to suppress evidence found at his residence. Upon review, we affirm.

On March 23, 2004, Detective George Workman of the Graves County Sheriff's Office sought a search warrant for 579 Lakeshore Drive in Mayfield, Kentucky - the residence of Appellant Garber. In support of his efforts, Detective Workman

tendered an affidavit stating that he had received information on the same day at approximately 4:30 p.m. concerning drug activity at this address. The salient portion of the affidavit reads as follows:

I have in the past two years had a confidential informant make a purchase of marijuana from this residence. I have in the past two years arrested Mr. Jason Garber of that residence for trafficking in marijuana, possession of marijuana and possession of drug paraphernalia. I spoke with a person that has given me reliable information in the past that has led to the arrest of another person. This person shall be referred to as a confidential informant or informant. The confidential informant advised me that they had been purchasing methamphetamine from Mr. Jason Garber numerous times in the past few months. The informant advised me that they had seen methamphetamine inside the residence at least eight times in the past few months. The informant said that they had seen a very large quantity of methamphetamine inside the residence in the past four days. The informant also advised that Mr. Garber said that he had just smoked it off. This is a process that I am familiar with in the manufacturing process that would involve drain cleaner combined with salt in a generator. This is one of the last stages of the methamphetamine manufacturing process.

The affidavit was signed and sworn to by Detective Workman before the Graves County Attorney at 8:47 p.m. and was taken before Judge Deborah Crooks at 9:10 p.m. It was executed on Garber's residence later that same night, and police recovered a number of items, including a variety of contraband,

suspected drug paraphernalia, controlled substances, and a nine millimeter handgun.

Consequently, on April 15, 2004, the Graves County Grand Jury indicted Garber on the following nine counts: (1) first-degree manufacturing methamphetamine (first offense - firearm enhanced); (2) first-degree methamphetamine possession (second offense - firearm enhanced); (3) possession of anhydrous ammonia with intent to manufacture methamphetamine (first offense - firearm enhanced); (4) receiving stolen property under \$300.00; (5) marijuana possession (firearm enhanced); (6) possession of drug paraphernalia (firearm enhanced); (7) & (8) first-degree wanton endangerment; and (9) being a second-degree persistent felony offender. Garber was later charged with two additional counts: receiving stolen property over \$300.00 and possession of a handgun by a convicted felon. On May 3, 2004, Garber appeared in open court with counsel and entered a "not guilty" plea to the pending charges.

On June 14, 2004, Garber filed a motion to suppress, claiming that the information in the affidavit relied upon by Detective Workman was vague and/or stale and that there were insufficient indicia of reliability about the confidential informant discussed therein to justify issuance of a search warrant. On June 28, 2004, the trial court conducted a brief hearing on the motion. During the hearing, the trial judge

concluded that the first two sentences of the affidavit did not support the informant's credibility or provide cause for a warrant; however, he further noted that previous information from the informant led to one arrest. Moreover, the judge found that the rest of the affidavit contained sufficient grounds for issuance of a warrant, including the fact that the informant had been in the residence on numerous occasions and had purchased methamphetamine, and the fact that the informant had seen methamphetamine at the residence at least eight times in the past few months - including a large quantity four days prior to the date that the affidavit was tendered. Accordingly, Garber's motion to suppress was orally denied. On July 1, 2004, the trial court entered an order memorializing the ruling.

On October 4, 2004, Garber signed a conditional guilty plea pursuant to RCr¹ 8.09 - reserving his right to appeal the suppression issue - and filed a motion to enter it into the record on October 19, 2004. Specifically, he pled guilty to the charges of manufacturing methamphetamine, possession of methamphetamine, receiving stolen property under \$300.00, receiving stolen property over \$300.00, possession of marijuana, and possession of drug paraphernalia, in exchange for the Commonwealth's recommendation of a total sentence of ten years' incarceration and dismissal of all remaining charges and firearm

¹ Kentucky Rules of Criminal Procedure.

enhancements. On December 14, 2004, the trial court entered a judgment and sentence order reflecting the terms of the conditional guilty plea. This appeal followed.

On appeal, Garber again argues that the affidavit tendered by Detective Workman did not provide sufficient probable cause for a search warrant. Garber also contends that the affidavit "contains nothing from which the reliability of the confidential informant can be assessed."

"The standard for determining whether an informant's tip provides probable cause for the issuance of a search warrant is based upon the 'totality of the circumstances' set forth in the police affidavit." Johnson v. Commonwealth, 180 S.W.3d 494, 499 (Ky.App. 2005), citing Illinois v. Gates, 462 U.S. 213, 230-31, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983); Lovett v. Commonwealth, 103 S.W.3d 72, 77 (Ky. 2003). "Under this test, the issuing magistrate need only '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.'" Lovett, 103 S.W.3d at 77, citing Gates, 462 U.S. at 238, 103 S.Ct. at 2332. "While an informant's veracity, reliability, and basis of knowledge are all 'relevant considerations in the totality of the circumstances analysis,' 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.'" Id. at 77-78, citing Gates, 462 U.S. at 233, 103 S.Ct. at 2329.

"The issue of probable cause is one of law and appellate courts may review the sufficiency of the information before the magistrate independent of the trial court's determination." Commonwealth v. Smith, 898 S.W.2d 496, 503 n.2 (Ky.App. 1995), citing State v. Frohlich, 506 N.W.2d 729, 732 (N.D. 1993). Nevertheless, "a magistrate's determination of probable cause is entitled to 'great deference' and should be upheld so long as the magistrate, considering the totality of the circumstances, had a 'substantial basis for concluding that a search would uncover evidence of wrongdoing.'" Lovett, 103 S.W.3d at 78, citing Gates, 462 U.S. at 236, 103 S.Ct. at 2331; Beemer v. Commonwealth, 665 S.W.2d 912, 914 (Ky. 1984); Massachusetts v. Upton, 466 U.S. 727, 732-33, 104 S.Ct. 2085, 2087, 80 L.Ed.2d 721 (1984). "It is within this rubric that we evaluate the decision of the trial court." Id.

After reviewing the affidavit leading to the search warrant in this case and the "totality of the circumstances" set forth therein, and after giving "great deference" to the lower court's finding of probable cause, we conclude that the trial court had a substantial basis for concluding that a search would

uncover evidence of wrongdoing. The confidential informant specifically advised Detective Workman that he or she had purchased methamphetamine from Garber on numerous occasions in the preceding months and had personally seen methamphetamine in the residence on at least eight occasions during that same period - including "a very large quantity of methamphetamine" in the four days prior to the search warrant being issued. The informant also advised Detective Workman that Garber told him or her that he had just "smoked it off," which Workman identified in the affidavit as "one of the last stages of the methamphetamine manufacturing process." The affidavit also set forth that the informant had given Workman reliable information in the past that had led to an arrest. We believe that these facts - taken together - were sufficient to provide probable cause for the issuance of a search warrant.

In reaching this decision, we note that Garber makes a particular point to criticize the lack of information in the affidavit filed by Detective Workman pertaining to the credibility of the confidential informant. We agree with Garber that "[t]ypically, a bare and uncorroborated tip received from a confidential informant, without more, would be insufficient to establish probable cause for a search warrant." Lovett, 103 S.W.3d at 78, citing Florida v. J.L., 529 U.S. 266, 270, 120 S.Ct. 1375, 1378, 146 L.Ed.2d 254 (2000). However, our case law

- Lovett in particular - holds that, even given this general rule, an "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles [the informant's] tip to greater weight than might otherwise be the case." Id., citing Gates, 462 U.S. at 234, 103 S.Ct. at 2330; United States v. Sonagere, 30 F.3d 51, 53 (6th Cir. 1994). Here, the confidential informant gave Detective Workman specific details pertaining to his multiple visits to Garber's residence and his or her first-hand observations of what occurred there. Accordingly, these observations and details must be afforded considerable weight in our analysis.

We also note that the tips received by Detective Workman implicate the informant in significant criminal activity, particularly since the informant's actions include uncontrolled purchases of methamphetamine. Our courts have recognized that "[s]tatements against the informant's penal interest also increase the degree of veracity that a court may attribute to the statements." Id., citing United States v. Harris, 403 U.S. 573, 583, 91 S.Ct. 2075, 2082, 29 L.Ed.2d 723 (1971). Specifically, our Supreme Court has noted that "[p]eople do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against

proprietary interests, carry their own indicia of credibility - sufficient at least to support a finding of probable cause to search." Id. at 78-79, citing Harris, 403 U.S. at 583, 91 S.Ct. at 2082 (additional citations omitted). Consequently, this fact serves to provide additional weight to the allegations set forth in the affidavit and further supports the decision to issue a search warrant.

In summary, we find that under the "totality of the circumstances" test, the trial court did not err in finding that the affidavit in question here was sufficiently indicative of probable cause so as to justify issuance of a search warrant. Accordingly, the judgment of the Graves Circuit Court is affirmed.

ALL CONCUR.

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