

RENDERED: JUNE 23, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000786-MR

MARK STEVEN BYRD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 01-CR-01275-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; POTTER, SENIOR
JUDGE.¹

POTTER, SENIOR JUDGE: Mark Steven Byrd (Byrd) brings this
appeal from an opinion and order of the Fayette Circuit Court,
entered March 14, 2005, granting the Commonwealth's motion to
correct the court's opinion and order of November 9, 2004, that
pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42
vacated and set aside Byrd's April 30, 2002, guilty plea,
judgment and sentence. Concluding that the trial court had lost

¹ Senior Judge John W. Potter sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
Kentucky Revised Statutes 21.580.

jurisdiction to amend the November 9, 2004, opinion and order, we reverse.

In October, 2001, a Lexington Metro Police Narcotics Unit detective was told by a confidential informant (CI) that someone called "Bird" was selling cocaine out of a house off Third Street. The detective discovered that Byrd owned a home at 333 Nelson Street. An initial controlled buy situation with the CI failed because the CI could not be seen entering the residence. For a second controlled buy, the CI was provided with marked money and sent into Byrd's residence that he shared with his wife and co-defendant Patricia Byrd.² After leaving the residence the CI gave the detective an "eight ball" of cocaine that he claimed to have bought from "Bird."

The detective thereafter sought a search warrant, indicating by affidavit that he had:

Received information from a confidential informant that a subject known to him as Byrd was selling cocaine from a house on a street off of Third. The C.I. was asked to describe the location. It was then determined that the location in question was Nelson St. The C.I. stated that the house was about half way up on Nelson sitting on the west side of the street. Further investigation revealed that "Byrd" is actually Mark Byrd of 333 Nelson St. The C.I. has purchased narcotics for the narcotics unit on four other occasions

² On the date Byrd entered his guilty plea, charges of first-degree trafficking in a controlled substance (cocaine) and possession of drug paraphernalia were dismissed against Patricia Byrd on the Commonwealth's motion.

leading to 2 arrest (sic). The C.I. has also provided value (sic) information on suspected drug dealers in the past. This C.I. has proven to be trustworthy as well as reliable on all dealings with this narcotics unit.

And that he independently investigated:

Within the past 48 hours this detective met with the aforementioned confidential informant (C.I.) to make a controlled purchase of cocaine from 333 Nelson St. This detective provided the C.I. with money to make the purchase. The money was photocopied to record its serial numbers. The informant was observed going to and entering the aforementioned address. The C.I. was also observed exiting the aforementioned address. The C.I. was then followed back to a predetermined location where (sic) detectives recovered suspected cocaine purchased from 333 Nelson St. The C.I. was then debriefed stating that the C.I. had purchased the cocaine from a subject known as Mark Byrd.

The search revealed \$544.00 in cash found in Byrd's right jeans' pocket; small bags containing suspected cocaine found in a hair spray can found in bedroom; note pad containing "numbers, etc." found on kitchen table; cell phone containing phone numbers found in bedroom; cash from Patricia's wallet; box of baggies; and cell phone from bedroom.

Based on the above, Byrd was indicted on charges of first-degree trafficking in a controlled substance (cocaine)³ and

³ Kentucky Revised Statutes 218A.1412.

possession of drug paraphernalia.⁴ He was also indicted as a second-degree persistent felony offender (PFO II).⁵

Prior to trial, the trial court overruled Byrd's motion for disclosure of the identity of the confidential informant.

At a suppression hearing held on Byrd's motion to suppress evidence seized from the search of his residence, it was revealed that although the affidavit in support of the search warrant correctly stated that the detective had twice before used the CI and both times had resulted in an arrest, the information in the affidavit that the CI had been previously used two other times was information gathered solely from records kept by the narcotics unit which showed that the previous use was three years before, and that previous use did not result in arrests. By order entered March 21, 2002, the court overruled the motion, finding:

That there was sufficient basis to obtain the search warrant - Information the officer provided to Judge Bunnell was sufficient to allow Judge Bunnell to establish probable cause to issue the search warrant.

On March 26, 2002, Byrd's conditional guilty plea was accepted by the court. Byrd pleaded guilty to one count of trafficking in a controlled substance (cocaine) and PFO II, with

⁴ Kentucky Revised Statutes 218A.500.

⁵ Kentucky Revised Statutes 532.080.

the possession of drug paraphernalia charge dismissed. On April 30, 2002, judgment was entered sentencing Byrd to five-years' imprisonment, enhanced to ten-years' imprisonment by virtue of PFO II.

Byrd timely appealed this judgment to the Court of Appeals. On November 7, 2003, another panel of this court affirmed the judgment in an unpublished opinion, finding that:

It is not clear from the record that the parties and the court were in agreement as to what was being appealed. In the case at bar, [Byrd] raised two separate issues in the trial court before he entered his plea. At the sentencing hearing, defense counsel did not indicate [Byrd] was appealing more than a single 'ruling.' In his brief on appeal, [Byrd] raises two issues. We do not think it would be fair or efficient for this court to simply assume that [Byrd] wanted to appeal all of his issues below. [RCr 8.09] requires issues be specified so as to avoid the necessity of a wholesale review of everything that has occurred in the trial court, and to favor addressing only those issues that the defendant deemed worthy of appealing.

We decline to review [Byrd's] arguments on appeal because of his failure to preserve specific issues with his conditional guilty plea.⁶

Byrd thereafter filed an RCr 11.42 motion, requesting the vacation of his judgment and sentence and withdrawal of his plea, arguing alternatively that the plea was not knowing,

⁶ Mark Steven Byrd v. Commonwealth of Kentucky, 2002-CA-000956-MR. In a concurring opinion, one panel member agreed that the judgment should be affirmed, but only because the trial court did not err in refusing to order the Commonwealth to disclose the identity of the informant.

voluntary, or intelligent due to trial counsel's deficient performance in failing to properly preserve issues for appeal under RCr 8.09; or that he be permitted to enter a conditional guilty plea to allow him to exercise his right to appeal.

On November 9, 2004, the trial court entered an opinion and order summarily sustaining Byrd's RCr 11.42 motion. The ruling set aside Byrd's March 22, 2002, conditional guilty plea and April 30, 2002, judgment and sentence of imprisonment. Although the court found that Byrd voluntarily and intelligently entered his guilty plea, it further found that trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because counsel's performance was deficient in failing to preserve the issues to be appealed on the conditional guilty plea resulting in this Court declining to review same, and this resulted in prejudice to Byrd through denial of his right to appeal on the merits. In the opinion and order, the court then set the matter for a status hearing on December 3, 2004.

At the status hearing, although acknowledging that the November 9, 2004, opinion and order said what it said, and wondering if jurisdiction were lost as to its ability to modify a sentence that it had already set aside, the trial court indicated that its intent all along was to make the plea conditional to allow Byrd to have his appeal on the merits. The

Commonwealth argued for the court to correct the sentence under RCr 11.42 to reflect that it was not vacated but modified as a conditional plea, thus reserving Byrd's issues for appeal. Byrd argued in opposition that he believed that the court's order placed him in the position where he was before he entered his plea and that the court had lost jurisdiction to amend a sentence that it had set aside.

On December 9, 2004, the Commonwealth filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.01/60.02 to correct the November 9, 2004, opinion and order of the trial court to reflect that Byrd's RCr 11.42 motion was granted; that the April 30, 2002, judgment be corrected to reflect that his plea was conditional; and that he had preserved his right to appeal. Byrd responded that the court had lost jurisdiction, and the parties argued again before the court on December 21, 2004.

On March 14, 2005, the trial court sustained the Commonwealth's CR 60.01/60.02 motion. Its opinion and order incorporated the November 9, 2004, opinion and order; concluded that Byrd was deprived of his Kentucky Constitution § 115 right to appeal under the two specific issues relating to his pretrial motion to suppress; and ordered that Byrd's March 22, 2002, guilty plea entered on March 26, 2002, and judgment entered April 30, 2002, be amended *nunc pro tunc* to permit Byrd to

appeal. Notice of appeal of this opinion and order were timely filed, and this appeal followed.

Before us, Byrd argues that the trial court was without jurisdiction, under CR 60.01, RCr 10.10, CR 60.02(a) or CR 60.02(f), to amend its November 9, 2004, opinion and order. Byrd alternatively argues, in the event this Court finds that the trial court did have jurisdiction to amend its November 9, 2004, opinion and order that the trial court erred in overruling his motion to suppress.

The initial question before us is whether the trial court had jurisdiction to amend its November 9, 2004, opinion and order.

Despite the filing of the CR 60.01/60.02 motion, pursuant to RCr 11.42(8), the November 9, 2004, opinion and order vacating and setting aside the plea, judgment and sentence became effective on December 9, 2004, upon expiration of the time for filing of a notice of appeal. The CR 60.01/60.02 motion did not toll the thirty-day time limit for filing a notice of appeal. United Tobacco Warehouse, Inc. v. Southern States Frankfort Cooperative, 737 S.W.2d 708 (Ky.App. 1987).

Additionally, the Commonwealth's CR 60.02 motion did not resurrect the November 9, 2004, opinion and order. In Turner v. Commonwealth, 10 S.W.3d 136 (Ky.App. 1999), the Kentucky Supreme Court held that neither a CR 59.05 or a CR

60.02 motion gave a trial court authority to reconsider its order allowing the withdrawal of a guilty plea and to reinstate a previously vacated order accepting the guilty plea. Although the facts in Turner differ from those herein, the analysis is analogous. Similar to herein where the plea was set aside, the plea in Turner had been ordered to be withdrawn. The court in Turner at 138 likened the withdrawal of the plea to restoring all of Turner's constitutional rights as a defendant who had pleaded not guilty. Also in Turner at 140, the court indicated that the criminal rules allowing a guilty plea and the withdrawal thereof do not contain language that permits the trial court to reconsider its original order allowing the withdrawal of the plea; likewise, neither does RCr 11.42. Thus, in Turner at 140-141, the court concluded that neither CR 59.05 nor 60.02 gave the trial court authority to reconsider its prior order allowing the withdrawal of the guilty plea and to reinstate the previously vacated order accepting the guilty plea. Therefore, pursuant to the reasoning in Turner, when the time for filing a notice of appeal ran on December 9, 2004, the Commonwealth's CR 60.01/60.02 motion did not toll the time and the November 9, 2004, opinion and order setting aside the guilty plea became final. See RCr 11.42(6), (7), (8).

Additionally, the Commonwealth's CR 60.01 motion failed to resurrect the November 9, 2004, opinion and order as

well. At issue herein is whether the November 9, 2004, opinion and order contained a "clerical" mistake, which admittedly can be addressed by CR 60.01. In Turner at 140, the trial court's original determination that the plea could be withdrawn was held to be, if error at all, a judicial error and not a clerical one, "because it was made within the trial court's discretion in light of the facts presented at that time." Herein, *amending nunc pro tunc* the original guilty plea, judgment and sentence, after *vacating and setting aside* the original guilty plea, judgment and sentence, can only be categorized as "judicial," not "clerical."

Thus, we conclude that at the time of entry of the March 14, 2005, order the trial court lacked jurisdiction to reconsider its November 9, 2004, opinion and order sustaining Byrd's RCr 11.42 motion and setting aside the guilty plea, judgment and sentence. Upon remand, Byrd is restored to the status of a person who has pleaded not guilty.

Because Byrd's next issue was fully briefed and is subject to being revisited upon remand, we will address its merits. Byrd argues that the trial court erred in failing to require that the identity of the confidential informant be revealed, and in overruling his motion to suppress evidence seized in the execution of the search warrant based on an insufficient affidavit. We disagree.

First, in denying Byrd's motion to reveal the identity of the CI, the trial court found that the informant was not an actual witness to the offenses charged. Kentucky Rules of Evidence (KRE) 508 grants a privilege to the Commonwealth to refuse to disclose the identity of a confidential informant. "Exceptions to the privilege occur when the disclosure is voluntary, when the informant is a witness and when the testimony of the informant is relevant to an issue." Taylor v. Commonwealth, 987 S.W.2d 302, 304 (Ky. 1998). As none of these exceptions applied, and the trial court's ruling is supported by substantial evidence, the court's ruling was proper.

Next, Byrd argues that the evidence in support of the affidavit for the search warrant was insufficient. More specifically, he contends that the affiant did not have sufficient personal knowledge to support the allegations concerning the reliability of the CI that were made in the affidavit. Pursuant to Commonwealth v. Smith, 898 S.W.2d 496, 503 (Ky.App. 1995), we review this issue to "examine whether the issuing judge had a substantial basis for concluding that the affidavit in support of the warrant established probable cause," keeping in mind that a magistrate's ruling on probable cause should be afforded great deference by reviewing courts. Illinois v. Gates, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527, 547 (1983). On this particular issue, evidence

established that the most recent two times the CI had been used, which were known personally to the affiant, resulted in arrests. Although the affidavit could have perhaps been better drafted, we fail to see how the statements in the affidavit taken as a whole rise to the level enunciated in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) as they were not false statements made knowingly and intentionally, nor made with reckless disregard for the truth. We thus decline to disturb the trial court's ruling.

The judgment of the Fayette Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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