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Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-002596-MR

CARLOS G. UPCHURCH

APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
INDICTMENT NO. 05-CR-00222

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Carlos Upchurch appeals from a judgment and sentence on a conditional plea of guilty, alleging the search warrant issued in this case was deficient.

After careful review of the record, we affirm the judgment and sentence.

On October 21, 2005, Terry Davis, a deputy in the Wayne County Sheriff's Department, received a tip from one of his confidential informants that there was a large quantity of marijuana located on property owned by Upchurch. This informant had given Davis "reliable information in the past regarding the location of controlled

¹ Senior Judge David C. Buckingham, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

substances.” The informant gave Davis a detailed description of the property, and Davis was able to confirm the description of the property through further investigation. Davis additionally testified that he had previously received tips that Upchurch was involved in the processing and sale of controlled substances.

On the same day he received the tip, Davis wrote an affidavit for a search warrant in which he recited the above facts in support of the request. A Wayne District Court Judge signed a warrant, which commanded police to make an immediate search of Upchurch’s property.

On October 22, 2005, members of the Wayne County Sheriff’s Department executed the search warrant. As officers entered the residence through the back door, they detected the “strong odor of marijuana.” Officers then found a black trash bag that contained two zip-lock bags which were full of marijuana. Officers found more bags in a nearby cooler and more marijuana inside a bar located on the property. In total, the officers found 9.4 pounds of marijuana on Upchurch’s property. Officers also found an unlabeled bottle containing five hydrocodone tablets. Upchurch was found to be armed when arrested.

On November 15, 2005, a Wayne County grand jury indicted Upchurch on one count of trafficking in marijuana over five pounds and one count of possession of a controlled substance in the second-degree. On December 9, 2005, the Commonwealth moved to amend the indictment so as to change the one count of trafficking in marijuana over five pounds to trafficking in marijuana over five pounds while in possession of a firearm. The indictment was so amended.

Upchurch filed a motion to suppress on March 9, 2006, wherein he requested the trial court suppress the evidence seized on his property because: (1)

there was nothing to show the reliability of the informant; (2) the search warrant was defective because of omitted material facts; and (3) no exceptions apply to this search.

The motion to suppress was heard on March 22, 2006. Upchurch requested the court to rule the warrant and affidavit defective on its face. The court declined to do so, and Upchurch requested a full evidentiary hearing. The Commonwealth, however, responded by pointing out that Upchurch's motion was premised upon the position that the affidavit was defective on its face, and therefore the affidavit itself was the only evidence relevant to the motion. The court then overruled the motion to suppress.

Upchurch filed a motion to alter, amend, or vacate the trial court's overruling of his motion to suppress. The court overruled the motion, and Upchurch subsequently entered a conditional plea of guilty. The motion to enter a guilty plea form had the word "conditional" written at the top, but the form itself does not state the condition. Upchurch was sentenced to five years, to be conditionally probated for five years. This appeal followed.

In order to properly preserve an issue via a conditional guilty plea, RCr 8.09 requires in pertinent part that "[w]ith approval of the court a defendant may enter a conditional plea of guilty, reserving *in writing* the right, on appeal from the judgment, to review of the adverse determination of any *specified* trial or pretrial motion." (emphasis added). The written record of the conditional guilty plea indicates that the suppression argument was not reserved in writing, but the tape of the entry of the plea shows that it was reserved orally. Therefore, although inartfully done, the suppression issue was preserved for appellate review by the conditional plea proceedings. See *Gabbard v. Commonwealth*, 887 S.W.2d 547, 550 (Ky. 1994)(holding that acknowledgement and

reference by the court of an issue in conditional plea proceedings can preserve said issue for appellate review).

Carlos argues that the affidavit in support of the search warrant was deficient in that it did not contain sufficient particularized facts from which the issuing magistrate could find a substantial basis for probable cause. He contends all evidence gathered pursuant to the warrant is thus fruit of the poisonous tree and should be suppressed. We disagree.

In *Lovett v. Commonwealth*, 103 S.W.3d 72, 77 (Ky. 2003), the Kentucky Supreme Court noted that in deciding whether probable cause exists, the issuing magistrate need only “make a practical, common-sense decision whether, given all the circumstances set forth before him,...there is a fair probability that contraband or evidence of a crime will be found in that particular place.” Moreover, the magistrate's finding is to be paid great deference by the reviewing court. See *Ragland v. Commonwealth*, 191 S.W.3d 569 (Ky. 2006). It is also well-settled in this Commonwealth that after a hearing on a defendant's suppression motion, the trial court's findings are deemed to be conclusive if supported by substantial evidence. See, e.g., *Talbott v. Commonwealth*, 968, S.W.2d 76 (Ky. 1998); *Canler v. Commonwealth*, 870 S.W.2d 219 (Ky. 1994), citing *Harper v. Commonwealth*, 694 S.W.2d 665 (Ky. 1985) and *Crawford v. Commonwealth*, 824 S.W.2d 847 (Ky. 1992). Substantial evidence means “[e]vidence that a reasonable mind would accept as adequate to support a conclusion” and evidence that, when “taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men.” See *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Finally, 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. See *Commonwealth v.*

Neal, 84 S.W.3d 920, 923 (Ky.App. 2002).

The circumstances as set forth in the affidavit included: (1) a tip from a known police informant who had given prior reliable tips; (2) the officer corroborated the tip by verifying that the property matched the informant's description; and (3) the officer had previously received tips that Carlos was involved in drug trafficking. While Carlos would have this Court invalidate the warrant because it "does not clearly state at what time the informant viewed the controlled substance," this would be wrong as a matter of law. Lovett provides that,

[w]hile 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.'

Lovett, at 77-78 (quoting *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). While the search warrant affidavit does not state the informant's basis of knowledge, it does specifically provide that the informant had provided the Deputy with reliable information in the past and Deputy Davis verified the tip to the extent possible. Thus, the showing of the informant's veracity and reliability as well as Deputy Davis' partial corroboration of the tip compensate for the affidavit's failure to state the informant's basis of knowledge. Accordingly, we find that the judge was able to make a practical, common-sense decision that under the totality of the circumstances there was a fair probability that contraband or evidence of a crime would be found.

The judgment and sentence of the Wayne Circuit Court is hereby affirmed.

ALL CONCUR.

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