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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000636-MR

JONATHAN E. DEYOUNG — APPELLANT

v.

APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 06-CR-00044

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Jonathan E. DeYoung appeals from the January 22, 2007, and February 20, 2007, judgments of the McLean Circuit Court, denying his motion to suppress certain evidence and finding him guilty of various criminal offenses. We affirm.

[1] Senior Judge William L. Knopf 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.

On December 4, 2006, DeYoung was indicted by a McLean County grand jury on the following charges: one count of trafficking in a controlled substance in the first-degree, while in the possession of a firearm, or by complicity with Jessica DeYoung; one count of possession of a controlled substance in the first-degree, while in possession of a firearm; one count of possession of drug paraphernalia, while in possession of a firearm, or by complicity with Jessica DeYoung; one count of possession of marijuana, while in possession of a firearm, or by complicity with Jessica DeYoung; and one count of receiving stolen property. The indictment arose from a November 2, 2006, visit to DeYoung's home, subsequent search warrant, and later arrest of DeYoung and his wife, Jessica DeYoung. The DeYoungs moved to suppress the evidence discovered by the search of themselves and their home.

On January 8, 2007, a suppression hearing was held, and on January 22, 2007, the court entered findings and an order denying the motion to suppress. The facts, as found by the trial court are as follows: McLean County Sheriff Frank Cox, Officer Brent McDowell, Deputy Chuck Payne and Mindy Neal, an employee of the Daviess County office for the Cabinet for Health and Family Services ("CHFS"), went to the apartment occupied by DeYoung, his wife and his children, to investigate allegations of drug usage in front of the children. Officer McDowell

was a K-9 specialist and brought a drug dog with him. Sheriff Cox also had an outstanding warrant for Ms. DeYoung.

Upon seeing the officers, Ms. DeYoung fled to the second floor of the home, where Sheriff Cox followed and encountered both Mr. and Ms. DeYoung. Sheriff Cox requested that the DeYoungs follow him downstairs where he explained the arrest warrant and the complaints to CHFS. DeYoung became agitated and was removed to another room by Officer McDowell, who noticed a bulge in DeYoung's pocket. Officer McDowell patted DeYoung down and discovered a pocket knife and a metal container containing what he believed to be methamphetamine. DeYoung was then arrested and placed into a police car.

In the meantime, Sheriff Cox and Ms. DeYoung were engaged in conversation about searching the residence. Testimony among the parties was conflicting as to whether or not Ms. DeYoung granted permission for the residence to be searched. The trial court found that permission was granted by Ms. DeYoung but was in fact coerced. After receiving permission, Officer McDowell brought the dog into the residence and the dog indicated the presence of drugs in four locations within the residence. Outside the residence, Ms. Neal had spoken with one of the children who told of "white stuff" in the home, people coming in and out of the home with baggies, and his parents using "white stuff." Sheriff Cox then sought and obtained a search warrant.[2] Upon execution of the warrant, Sheriff Cox

[2] Sheriff Cox testified that prior to November 2, 2006, he had received complaints, from the manager of the apartment, of traffic going in and out of DeYoung's apartment; he had general information that the residence was involved in the sale and use of drugs; and he had specific information about an individual who claimed to have purchased methamphetamine from the

found various items containing drugs, various items of drug paraphernalia and a stolen firearm.

Pursuant to a plea agreement, DeYoung entered a conditional plea, reserving the right to appeal the court's suppression ruling, of guilty to first-degree trafficking in a controlled substance, first-degree possession of a controlled substance, possession of drug paraphernalia while in possession of a firearm, possession of marijuana while in possession of a firearm, and receiving stolen property. DeYoung was sentenced to concurrent five-year prison terms for each count. This appeal followed.

DeYoung makes the following arguments on appeal: 1) the trial court was correct in ruling that contraband was illegally seized in DeYoung's pat down and that Ms. DeYoung gave no consent to search, but erred in otherwise overruling the motion to suppress; 2) the trial court correctly ruled that contraband was improperly seized during appellant's pat down; 3) the court correctly ruled that Ms. DeYoung's purported consent to search was not freely given; and 4) deploying the dog to explore the home for contraband was an illegal search.

When reviewing a trial's courts admission or suppression of evidence, the Court utilizes a two-part evaluation. The court's findings of facts are conclusive if they are supported by substantial evidence. The court's conclusions of law are reviewed de novo. Bishop v. Commonwealth, 237 S.W.3d 567, 568-9 (Ky.App. 2007) (internal quotations omitted). See also RCr 9.78.

DeYoung residence less than two weeks prior to the arrest.

It is not necessary for us to address those portions of DeYoung's argument in which he agrees with the trial court's findings. Therefore, the only issues remaining before the Court are whether the denial of DeYoung's suppression motion was error and whether deploying the dog to explore for contraband was an illegal search. Based on the testimony of the parties, we believe the trial court's findings of fact to be supported by substantial evidence. We next look to the trial court's conclusions of law.

In its January 22, 2007, order, the trial court stated:

> Despite the coerced consent to search, it should be first pointed out that nothing was actually seized as the result of this tainted consent. Although a police dog did hit on certain areas, indicating the presence of drugs, no drugs were looked for or seized. Further, Sheriff Cox did obtain a search warrant in this case.
>
> Accordingly, this court turns its attention to the affidavit signed by Sheriff Cox in support of the search warrant. If the affidavit is stripped of the information concerning the drug dog making certain hits inside the residence, and the drugs found on Mr. DeYoung, the affidavit still contains sufficient information to provide probable cause to believe that drugs would be found in the residence of the Defendants. Specifically, the affidavit contains the information that Sheriff Cox had information from the apartment manager and social services that there was drug usage in the apartment. Sheriff Cox also had the information obtained by Ms. Neal from one of the children of the Defendants that "white powder" was used by the Defendant and was located in certain areas of the residence. Sheriff Cox also had information that within days earlier a named individual had purchased methamphetamine at this residence. All this information was lawfully obtained and provides probable cause for the issuance of the search warrant.

> If the Commonwealth can establish by a preponderance of the evidence that the items would have ultimately been discovered by lawful means, the evidence should be received. *Commonwealth v. Elliot*, Ky.App., 714 S.W.2d 494 (1986). That is the case at bar. Accordingly, the drugs on the person of Mr. DeYoung would have been inevitably discovered during the search of the apartment pursuant to the search warrant.

In order for an affidavit in support of a search warrant to be sufficient, the information sworn to by the officer must establish a substantial basis for concluding that contraband or evidence of a crime will be found in the place searched. *Beemer v. Commonwealth*, 665 S.W.2d 912, 914 (Ky. 1984) *quoting Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527. 103 S.Ct. 2317 (1984). Probable cause exists when the totality of the circumstances creates a fair probability that contraband or evidence of a crime can be found. *Id.* Where the trial court conducts a suppression hearing, the factual findings of the court are conclusive if those findings are supported by substantial evidence. RCr 9.78. To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause. The same basic standard also applies when affidavits omit material facts. *Commonwealth v. Smith*, 898 S.W.2d 496, 502-03 (Ky.App. 1995).

We note that the affidavit does not, in fact, contain information regarding the allegations of the apartment manager. Nonetheless, we agree with the trial court that the affidavit was not rendered invalid by the inclusion of facts

regarding the tin containing drugs found on DeYoung nor the information regarding the search conducted by the drug dog. The affidavit stated that information had been received from a named informant regarding the purchase of methamphetamines from the residence. It also stated that information had been received from one of the DeYoung's children regarding a "white powder" that was kept in the house and people that would come to the residence to retrieve the white powder in "little bags." We hold that this information alone would have been sufficient to obtain the search warrant, therefore making the search warrant, and that evidence discovered during the search, valid. Because the affidavit was sufficient to obtain a warrant without the actions of the drug dog, it is not necessary for us to determine if the use of the drug dog was an illegal search.

Accordingly, the judgment of the McLean Circuit Court is affirmed.

ALL CONCUR.

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