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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001472-MR

CURTIS SCOTT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
INDICTMENT NO. 05-CR-003712

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: After the Jefferson Circuit Court denied his motion to suppress evidence seized pursuant to a search warrant, Curtis Scott entered a

[1] Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

conditional plea of guilty to Trafficking in a Controlled Substance I (Cocaine) While in Possession of a Firearm; Trafficking in Marijuana (More than 8 Ounces But Less Than 5 Pounds) While in Possession of a Firearm; Wanton Endangerment I (Two Counts); Illegal Use or Possession of Drug Paraphernalia While in Possession of a Firearm; and Trafficking in a Controlled Substance I (Cocaine). A Persistent Felony Offender II count was dismissed as a result of plea negotiations. In accordance with the terms of the plea agreement, Scott was sentenced to serve ten years in prison without the possibility of parole. On appeal, Scott argues that the circuit court's denial of his motion to suppress evidence should be reversed because the search warrant under which the evidence was seized was based on stale information in the supporting affidavit and because the affidavit contained false and misleading statements without which there was insufficient probable cause to support issuance of the warrant. We affirm.

FACTS

Detective Scott Gootee[2] of the Louisville Metro Police Department received information that Curtis Scott was trafficking in drugs from his apartment at 2309 Lee Street in Louisville. Detective Gootee's confidential informant told him that Scott stored cocaine at both of the apartments at that address and moved the cocaine back and forth between them. The affidavit for the search warrant under scrutiny here was dated at 1200 hours on October 13, 2005, and stated

[2] Although the record is clear that the detective's name is spelled "Gootee," the circuit court orders spell his name "Godey," a phonetic spelling of the name which is probably the result of a transcription error. The Commonwealth's brief used the incorrect spelling. We have used the correct spelling throughout this opinion.

among other things that the informant had seen a large quantity of cocaine at Scott's address "in the last 24 hours." As part of his independent investigation, the detective related in the affidavit that he had observed Scott "going in and out of both doors the front and the side" at his Lee Street address.

A search warrant was issued based on the allegations contained in the affidavit. On October 22, 2005, Detective Gootee and other Louisville Metro officers executed the warrant. Scott, James Smith and another person[3] were present when the officers announced "Police-Search Warrant," and, when no one answered after 20 seconds, broke open the door with a battering ram. Scott thought he was the victim of a home invasion and fired a shot from a .357 Magnum revolver at the officers. No one was injured. Scott put down the gun as soon as he realized the entrants were police officers, and offered no further resistance. In the meantime Smith kicked out a window air conditioner, jumped off the roof and fled the apartment, but was soon apprehended. Although Smith apparently fled with a large quantity of drugs, which he jettisoned as he ran, he was released from custody when the district court case against him was dismissed on December 29, 2005. Statements in motions filed in this case indicate that he was not subsequently indicted.

Scott testified at his suppression hearing that his weight in October, 2005 at the time of the search was 470 pounds and that he was suffering from three hernias. He testified that his physical condition prevented him from negotiating

[3] The other person is referred to only as "Jolly" in an affidavit given by Smith. He is not mentioned anywhere else in the record and he plays no material part in this case.

the steps between his apartment and the other apartment in the duplex. He testified that he had not been in the other apartment since August 2005, and that he only left his apartment about once a week, usually for doctor visits. On cross examination, Scott admitted that he was also able to leave his apartment occasionally to visit friends and family. The court also permitted the filing in evidence of an affidavit from James Smith, which corroborated Scott's testimony about his lack of movement between the apartments due to his weight and physical condition and in which Smith also claimed ownership of some of the drugs found in Scott's residence. Smith was not present to testify at the hearing.[4]

STANDARD OF REVIEW

"An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing Kentucky Rules of Criminal Procedure (RCr) 9.78); *see also Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001) ("With regard to the factual findings of the trial court 'clearly erroneous' is the standard of review for an appeal of an order denying suppression.") (citing *Ornelas v. United States*, 517 U.S. 690, 691, 116 S.Ct. 1657, 1659, 134 L.Ed.2d 911 (1996)). "Based on those findings of fact, we

[4] It appears from the briefs and the record of the suppression hearing that Smith appeared at Scott's counsel's office in February 2006 and agreed to give a sworn statement, then disappeared. Although both Scott and the Commonwealth were apparently interested in procuring his presence as a witness, his whereabouts were unknown at the time of the hearing.

must then 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." *Neal* at 923 (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky.App. 1999)).

STALENESS

The factual basis for Scott's first argument, that the affidavit in support of the search warrant contained stale information, is that while the affidavit states on its face that on October 13, 2005, the confidential informant told Detective Gootee that the informant saw a large quantity of cocaine in Scott's apartment "in the last 24 hours," the warrant was not issued until October 22, 2005, nine days later.

The detective testified at the suppression hearing that although he commenced his investigation on October 13, the affidavit was in fact prepared on October 21, and the informant saw the cocaine twenty-four hours before that. In its written Opinion and Order, the trial court accepted the detective's explanation, citing *Commonwealth v. Opell* for the proposition that an officer's testimony at a suppression hearing is sufficient to cure such defects. *See Opell* at 752. In its order the trial court also cited *Ragland v. Commonwealth*, 191 S.W.3d 579 (Ky. 2006) for the proposition that, even in situations where, as here, it appears from the face of the affidavit that underlying information may be stale, probable cause may still be found where recent information confirms that stated in the affidavit. *See Ragland* at 584. Scott urges us not to accept the justification of *Opell* as the

complete answer to the staleness question, reminding us that *Opell* recognized that exclusion of seized evidence is still an appropriate remedy where the affidavit is "so lacking in indicia of probable cause such that the officer's reliance cannot be reasonable," citing *Opell* at page 752.

While Scott has correctly quoted the case, we disagree that the affidavit in this case was so deficient. We believe that the trial court's written finding that Detective Gootee confirmed that the informant saw drugs in Scott's apartment within 24 hours of the preparation of the affidavit is supported by substantial evidence and is therefore conclusive. RCr 9.78; *Commonwealth v. Neal* at 923. We do not believe that the information in the affidavit was stale as a matter of fact, and even if the time references were interpreted as Scott urges, we do not believe that the proper remedy in this case would have been suppression of the evidence. It was amply demonstrated in this case that the detective was acting in good faith within the meaning of *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), as applied in Kentucky in *Crayton v. Commonwealth,* 846 S.W.2d 684 (Ky. 1992). We find no error.

FRANKS V. DELAWARE ISSUES

Scott next argues that the evidence seized in this case must be suppressed because the affidavit contained false and misleading statements without which there was insufficient probable cause to support the issuance of the warrant. Scott relies on *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) and cases following it as authority for his argument that the evidence must

be suppressed or that at least he is entitled to a hearing to determine whether suppression is required. Scott claims that Detective Gootee's statements in the affidavit that he saw Scott moving between the two apartments at 2309 Lee Street, and that foot and vehicular traffic made numerous brief visits to Scott's apartment, are wrong. The factual support for this part of his argument is his testimony at the suppression hearing to the effect that he was unable to easily move between the apartments due to his obesity and medical problems and the affidavit of James Smith. Smith's affidavit appears to be the only source of contradiction of the statement in the search warrant affidavit that people would come and go from the apartments, staying only short periods. Somewhat ironically, although Smith in the affidavit claims ownership of much of the cocaine found in Scott's apartment, he admits that he stole the cocaine from a dealer and brought it to Scott's apartment intending to ask Scott if he "knew how or would help me sell it." He claimed that at the time the police broke down the door Scott was unaware that Smith had the cocaine.

Franks v. Delaware holds that when a person challenging the validity of a search warrant makes a sufficient showing that some part of the affidavit supporting the warrant was deliberately falsely made, or was made with reckless disregard for the truth, and when that part of the affidavit is excluded the remaining part contains insufficient probable cause to support issuance of the warrant, a hearing is required. *Franks,* 438 U.S. at 171-72; 98 S.Ct. at 2684-85. The purpose of a so-called "*Franks* hearing" is to determine whether or not the non-offending

portion of the affidavit was indeed sufficient to support issuance of a search warrant or whether the warrant must be voided.

In this case, the circuit court was thoroughly familiar with *Franks*, quoting it at length in the Opinion and Order. The court determined that Scott did not carry his burden of showing by a preponderance of the evidence that the information contained in the affidavit was false and misleading. Although the court permitted the filing of Smith's affidavit, it was afforded limited weight and credibility due to the fact that Smith was not present and subject to cross-examination. As a reviewing court, we are mindful that we must give due weight to the trial court's assessment of the credibility of witnesses and to the reasonableness of the inferences drawn from the evidence at a suppression hearing. *Commonwealth v. Whitmore,* 92 S.W.3d 76, 79 (Ky. 2002). In our view the trial court's factual findings are supported by substantial evidence, and as such, they are conclusive. RCr 9.78. We cannot find that any of the court's findings are clearly erroneous. The court in this case found that Scott failed to carry his burden of making the first showing required by *Franks,* that part of the affidavit should be excluded. In such a case, no hearing is required.

The Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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