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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-002033-MR

LESLIE PRIDE

APPELLANT

v. APPEAL FROM UNION CIRCUIT COURT  
HONORABLE C. RENE' WILLIAMS, JUDGE  
ACTION NO. 07-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: Leslie Pride appeals from a conditional plea of guilty to one count of trafficking in marijuana over 5 pounds, first offense. He contends that an affidavit upon which a search warrant was based contained false or misleading information and failed to establish probable cause. For the reasons stated below, we agree that the affidavit failed to establish probable cause, and accordingly reverse the order on appeal.

On November 9, 2006, the Kentucky State Police obtained a warrant

authorizing the search of Pride's residence. The warrant was based on the statement of a confidential informant which indicated that Pride told the informant more than one year earlier that Pride had 240 marijuana plants and priced the marijuana at \$600 per quarter pound. According to the informant, Pride did not tell him where the plants were located.

KSP Detective McKinney confirmed Pride's identity and the location of his residence. McKinney checked Pride's criminal history which revealed one or more convictions for drug trafficking. McKinney would also later state that the informant's credibility had been previously established.

The affidavit stated that a detective subpoenaed 24 months of utility records for Pride's residence and two similar residences located in the vicinity of Pride's residence, and discovered that Pride's electricity usage was substantially greater than the similar residences. The two homes used for comparison were chosen based on a drive-by viewing. According to the affidavit, KSP Detective Moore concluded that - based on his experience - the excessive electrical usage was indicative of an indoor marijuana growing operation.

The warrant was executed on November 9, 2006, and KSP officers found 26 pounds of loose marijuana, additional marijuana packaged in 54 1-gallon sized Ziploc bags, and various items used to cultivate marijuana. The search resulted in Pride being indicted by the Union County grand jury on one count each

of trafficking in marijuana over five pounds (second offense), possession of drug paraphernalia, and second-degree persistent felony offender.

On March 20, 2007, Pride filed a motion to suppress the evidence obtained during the search. A hearing on the motion was conducted on April 9, 2007, where Pride argued that more than one year had elapsed between Pride's purported statement to the informant and the KSP's use of that information in the affidavit. Pride also challenged the validity of the claim that his house used an excessive amount of electricity. He noted that one of the two homes used in the comparison was occupied by elderly individuals who did not use much electricity, and that the other residence was not occupied for some period of time. He further pointed out that he had 3 children living at home who used a lot of electricity, and that his home had outdoor lighting and a hot tub which used additional electricity. At the conclusion of the hearing, the circuit court rendered an order denying the motion to suppress.

Thereafter, Pride entered a plea of guilty pursuant to a plea bargain. The charge of trafficking in marijuana over 5 pounds (second offense) was reduced to trafficking (first offense), and the PFO charge was dismissed. Pride was sentenced to six years in prison, and this appeal followed.

Pride now argues that the circuit court erred in denying his motion to suppress the evidence obtained during the search of his residence. He argues that the affidavit upon which the search warrant was based did not establish probable

cause to support the warrant. He further maintains that the so-called good faith exception cannot remedy the deficiency. Pride's argument centers on 1) the confidential informant's information being between 12 and 18 months old when the warrant was issued; 2) the failure of that information to make any claim that marijuana was located at Pride's residence; 3) the allegedly flawed analysis of the electricity usage of Pride and two other homes for comparison; and, 4) the officer's alleged conclusory statements set forth in the affidavit as fact. Pride maintains that the affidavit failed to establish probable cause to support the search warrant, and that as such, the evidence obtained as a result of the search should have been suppressed.

Pride's appeal is grounded on the Fourth Amendment to the United States Constitution, which states that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Similarly, the Kentucky General Assembly provided for this protection in § 10 of the Kentucky Constitution, which states that:

The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as

nearly as may be, nor without probable cause supported by oath or affirmation.

Probable cause is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). “The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,” and the belief of guilt must be particularized with respect to the person to be searched or seized. *Id.*

This notion has been incorporated into Kentucky case law. The Kentucky Supreme Court held, for example, that probable cause exists for the issuance of a search warrant if there is a fair probability that contraband or evidence of criminal activity will be found in the place to be searched. *Moore v. Commonwealth*, 159 S.W.3d 325 (Ky. 2005). The trial court must find probable cause exists based solely on the allegations set forth in the affidavits, and such allegations of fact must “compel the court’s attention.” *West v. West*, 664 S.W.2d 948 (Ky. App. 1984). *See also Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990); *Betzer v. Betzer*, 749 S.W.2d 694 (Ky. App. 1988).

In the matter at bar, the affidavit first sets forth the statement of the confidential informant alleging that Pride told the informant more than one year earlier that Pride possessed 240 marijuana plants. The informant did not state whether Pride allegedly still possessed the plants at the time of the affidavit, nor where the plants allegedly were located. At best, the informant’s statement

indicated that Pride made an incriminating statement to the informant the prior year. The Commonwealth acknowledges in its appellate brief that this statement, taken alone, was insufficient to create probable cause. Similarly, in ruling on Pride's motion to suppress, Judge Rene' Williams also concluded that the informant's statement - taken alone - failed to establish probable cause.

The question then is whether the analysis of the electrical usage of Pride's residence, when compared to the two homes selected during the drive-by, bolsters the affidavit sufficiently to establish probable cause to believe that Pride was growing marijuana in his residence. We must conclude that it does not. The record indicates that at the time the two homes were chosen for comparison to Pride's residence, Detective Weber was unaware that one of the homes was not occupied for a period of time during the 24-month period in question. Similarly, he did not know that the other residence - unlike Pride's residence housing two adults and three children - was occupied by two individuals over the age of 80. While the Commonwealth reasonably argued at the hearing that the detectives did not attempt to ascertain the number or ages of the residents at the two other locations for fear of revealing the nature of their investigation, the fact remains that a temporarily unoccupied residence and one occupied by two elderly individuals would necessarily use less electricity than one occupied by a family of five.

Detectives Weber and Moore's testimony at the hearing that there is no magic formula or guideline for choosing comparable homes is well taken.

Nevertheless, the detectives did not speak with anyone at Kentucky Utilities to determine if the electrical usage of Pride's home fell within KU's "high/low" expected usage for the residence. Had they done so, they would have determined that the electrical usage of Pride's home fell within the range that KU would reasonably anticipate for the residence.

Pride also introduced at the hearing the report and testimony of energy analyst John Williams. Williams went through every room of Pride's residence recording each electrical appliance for the purpose of estimating the amount of electricity the home might reasonably use. Williams' report was based in part on more than two hours of conversation with Pride's wife regarding the family's lifestyle, and it acknowledged the number and ages of the home's occupants. Williams opined that Pride's residence was a "high usage home" based on the number of appliances present, including outdoor lighting and a hot tub. He stated that the electrical usage of Pride's home during the preceding 24-month period was understandable based on the number of high energy consuming appliances.

The circuit court properly noted that the KSP cannot be held to the same standard of detail evidenced by analyst Williams, because the detectives obviously could not examine the interior of Pride's home in advance of seeking and executing a search warrant. Similarly, Williams' analysis also evidences so-called 20/20 hindsight, to which the KSP detectives were not availed.

Nevertheless, Williams' analysis is compelling evidence the electrical usage of Pride's home was not so excessive as to induce suspicion.

The standard of review when ruling on an order arising from a motion to suppress is two-fold. First, we must determine whether the circuit court's findings of fact are supported by substantial evidence. If so, its findings are conclusive. RCr 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998). Second, we must perform a *de novo* review of those factual findings to determine whether the decision is correct as a matter of law. *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001); *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000); *Garcia v. Commonwealth*, 185 S.W.3d 658, 661 (Ky. App. 2006). When examining the totality of the circumstances as presented to the trial court, we must conclude that the court erred in finding the existence of probable cause. Though provided by a known informant, the information was 1.5 years old when set out in the affidavit and did not allege that Pride's residence was implicated. Both the Commonwealth and the Union Circuit Court acknowledge that the informant's statement, taken alone, failed to establish probable cause.

We must also conclude that the comparison of Pride's electrical usage with that of the other two homes was not so compelling as to establish probable cause. While this is clearly a subjective determination, there is no evidence in the record that Pride's electrical usage is above that amount reasonably anticipated for



a household of five individuals. Comparing the electrical usage of Pride's home with the usage of a home that was sometimes unoccupied and another that was occupied by two elderly people - even though done in good faith - failed to create a fair probability that evidence of criminal activity would be found. *Moore, supra*. In sum, because the informant's tip was 1.5 years old and failed to implicate Pride's residence, and since no evidence was adduced that Pride's electrical usage exceeded the amount reasonably anticipated for a household of his size, we must conclude that no probable cause existed to support the issuance of the search warrant. Accordingly, the evidence obtained during the search should have been suppressed.

For the foregoing reasons, we reverse the July 7, 2007, order of the Union Circuit Court denying Pride's motion to suppress the evidence obtained during the search of his residence and remand for further proceedings.

ALL CONCUR.

ORAL ARGUMENT PRELIMINARY DRAFT

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