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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000965-MR

CLYDE EDWIN TILLMAN, III — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CR-00826

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: This appeal is from a final judgment of the Fayette Circuit Court whereby Appellant was convicted of various criminal charges related to the possession of illegal drugs. The legal issue presented arises from a search by Lexington Police of Appellant's residence. From the search, police detectives

[1] Senior Judge Joseph E. Lambert 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.

recovered approximately 199.1 grams of marijuana, 3,440.5 pills believed to be hydrocodone, 73.5 pills believed to be ecstasy, and 90 pills believed to be Xanax. These drugs were located throughout Appellant's house. Many of the hydrocodone pills were found in large bottles that are normally used only in pharmacies, and the majority of the pills were found in a blue duffel bag. Additionally, $572 in cash was found in the night stand, and a gun case and ammunition were discovered in a closet. A purported "drug ledger" or "debt list" was found in a notebook in Appellant's living room. Officers also found scales in the blue duffel bag with the hydrocodone.

Appellant was indicted on various trafficking charges. He was also charged with obtaining a prescription by fraud and of possession of drug paraphernalia.

At trial, Appellant testified that he was not a drug trafficker, but rather was addicted to pain pills and was using those found in his residence for his own personal consumption. According to Appellant, as his addiction grew, he began to fear that he would run out of pills and began to collect them in large quantities. He acknowledged that he ordered the majority of the pills from online pharmacies. He had some of the pills delivered to his sister's address in Georgia because Kentucky was getting stricter regarding online prescription deliveries. He also admitted to possessing the marijuana for personal use, and asserted that the ecstasy belonged to his wife. He acknowledged that he owned all of the pills that were found in the blue duffel bag.

The trial court granted a directed verdict of acquittal on the charges relating to Xanax because none of the suspected Xanax pills were tested. Otherwise, the jury found Appellant guilty of drug possession charges, but did not convict him of any of the trafficking charges. Appellant was sentenced to an aggregate term of ten years' imprisonment, which was probated. This appeal followed.

Appellant first argues that the trial court erred in failing to suppress the evidence seized because the affidavit supporting the search warrant was insufficient to establish probable cause. Specifically, he argues that the information contained in the affidavit was stale. As stated by the Kentucky Supreme Court, "a magistrate's determination of probable cause is entitled to 'great deference' and should be upheld so long as the magistrate, considering the totality of the circumstances, had a 'substantial basis for concluding that a search would uncover evidence of wrongdoing.'" *Lovett v. Commonwealth*, 103 S.W.3d 72, 78 (Ky. 2003) (citing *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983)). One of the required factors in a magistrate's probable cause determination is the age of the information provided in the affidavit. However, even in situations where it appears from the affidavit that underlying information may be stale, probable cause may still be found where recent information tends to corroborate the dated information stated in the affidavit. *Ragland v. Commonwealth*, 191 S.W.3d 569, 584 (Ky. 2006).

The search of Appellant's residence occurred on May 7, 2007. The affidavit supporting the search warrant cites four circumstances as creating probable cause. On February 23, 2006, Appellant was found with 35 grams of marijuana and five bags containing a total of 225 hydrocodone and Xanax. Appellant was arrested for trafficking in marijuana and controlled substances, although the disposition of the case was eventually reduced to a plea to the lesser charges of driving under the influence, and prescription medication not in an original container. Additionally, in April 2006, police received a call from a DEA agent advising them that Appellant was a major trafficker of marijuana in the Lexington area. Thereafter, Appellant was arrested in Alabama in May 2006 with three pounds of marijuana and 100 tablets of what was suspected to be ecstasy. Finally, the police made an independent investigation of Appellant's garbage on May 7, 2007, the same day the search warrant was issued by the magistrate and executed by the police, and found marijuana residue on baggies located in the garbage, as well as prescription tickets for Appellant's wife.

If the affidavit supporting this search warrant had been based solely on the information from 2006, the information may have been too stale to support the search warrant. However, the independent investigation conducted by the police on the day of the search provided recent information that marijuana was contained in the house, thereby tending to corroborate the other information in the affidavit. From the totality of the circumstances stated in the affidavit, the

magistrate had probable cause for concluding that a search would uncover evidence of wrongdoing in Appellant's home.

Appellant further argues that the search warrant was overly broad because it allowed the search and seizure of drugs that were not identified in the affidavit. The search warrant broadly authorized the police to search for and seize the following property:

> Marijuana, notes, letters, writings, documents, monies, safes, recordings, photos, drug paraphernalia, *or whatever type of drug the presence of would tend to indicate the illegal use of, possession of or trafficking in, as defined by the Uniform Narcotic Drug Act of 1982.*

(Emphasis added). Appellant argues that the affidavit only established probable cause for a search for and seizure of marijuana. He overlooks that the affidavit stated that police had received information that Appellant had been arrested previously with large amounts of hydrocodone, Xanax, or ecstasy at the same times he was found with marijuana. The affidavit recited facts that indicated Appellant's activity was of "a protracted and continuous nature" – drug trafficking – and that, in general, Appellant had additional drugs each time he was found with marijuana. *See Ragland*, 191 S.W.3d at 584 (citing *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972). Upon corroboration of the information related to marijuana, the magistrate was entitled to infer that illegal amounts of prescription pills or ecstasy would also be uncovered, particularly in view of Appellant's drug history. Therefore, the inclusion of language in the search warrant regarding drugs other than marijuana was supported by probable cause.

Appellant next argues that the trial court improperly failed to suppress all of the evidence seized because the affidavit was based on false or misleading information. In the trial court, Appellant made a pre-trial motion to suppress, which was denied by the court after a hearing on the record. On appeal, Appellant has provided this Court with his motion to suppress, the search warrant and supporting affidavit, and the trial court's order, which states, "for grounds stated . . . on the video [r]ecord, the Defendant's motion is hereby denied." However, the record on appeal does not contain the video record of the suppression hearing.

In *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303-04 (Ky. 2008), the appellant challenged the trial court's judgment based on a suppression issue and, as in this case, failed to ensure that the hearing record was made a part of the record on appeal. The Kentucky Supreme Court stated:

> The video record is incomplete as to portions of the suppression hearing; therefore to say that proof was not entered would be presumptuous at best. This Court is not in the business of making baseless presumptions. It is incumbent upon Appellant to present the Court with a compete record for review.

Id. at 303. Further, in *Davis v. Commonwealth*, 795 S.W.2d 942, 948-49 (Ky. 1990), where no copy or transcript of the suppression hearing was provided in the record, the Kentucky Supreme Court stated:

> Appellant has failed to show that the ruling below was not supported by substantial evidence. "In the absence of any showing to the contrary, we assume the correctness of the ruling by the trial court." It is the duty of a party attacking the sufficiency of evidence to produce a record of the proceeding and identify the trial court's error in its

> findings of fact. Failure to produce such a record precludes appellate review.

Id. at 949 (quoting *Harper v. Commonwealth,* 694 S.W.2d 665, 668 (Ky. 1985)).

As Appellant has not furnished any record of the suppression hearing, we are unable to review issues associated with the truth of information contained in the affidavit. It is Appellant's obligation to ensure that the record on appeal is sufficiently complete to allow for comprehensive review of the issues he raises. Without a record of the suppression hearing, this Court is unable to determine what happened in the trial court and whether the trial court's decision regarding the truth or falsity of the information provided was clearly erroneous. For all of the foregoing reasons, the denial of suppression is affirmed.

Appellant next argues that the trial court failed to exclude a quantity of untested hydrocodone pills. Of the approximately 3,440.5 pills believed to be hydrocodone, 1,000 pills were forwarded to the Kentucky State Police Central Forensic Laboratory for analysis and found to be hydrocodone. The trial court allowed the remaining pills to be admitted in evidence on grounds that Appellant's testing argument went to the weight of the evidence and not to admissibility.

The standard of review for the admission of evidence is whether the trial court abused its discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The Kentucky Court of Appeals discussed random selection procedures in *Taylor v. Commonwealth*, 984 S.W.2d 482 (Ky. App. 1998), where police seized 98 marijuana plants but only sampled a portion of the plants.

Affirming the admissibility ruling, this Court applied a test to determine whether such admission of evidence was appropriate:

> [A] proper random selection procedure was employed; the tested and untested substances were contemporaneously seized at the search scene; the tested and untested substances were sufficiently similar in physical appearance; the scientific testing method conformed with an accepted methodology; all of the samples subjected to scientific analysis tested positive for the same substance; and the absence of evidence that the untested substance was different from the tested substance.

Id. at 485.

From the foregoing, it appears that the ruling of the trial court with respect to admissibility of the hydrocodone pills was correct. Appellant's own testimony leads to this conclusion. Appellant never asserted that the untested pills were anything but hydrocodone. He freely admitted to the jury that he was addicted to hydrocodone and took fifteen to twenty pills a day. He also admitted that he accumulated hydrocodone through online pharmacies, receiving 500-600 pills a month. Appellant testified that he owned the contents of the blue duffel bag, which included the 1,000 pills that tested positive for being hydrocodone.

The *Taylor* factors were satisfied. A proper random selection was made. All of the pills were seized at the same time, and the majority of the untested pills were contained in the same blue duffel bag. As such, there was no abuse of discretion in the admission of the untested pills, but in any event, harmless error would cure any flaw in the proceeding.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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