

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001634-MR

CYNTHIA NEELEY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CR-00206 AND 08-CR-00206-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; HARRIS,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Cynthia Neeley appeals from the Fayette Circuit Court's judgment of conviction pursuant to a conditional guilty plea to possession of a methamphetamine precursor. Concluding that the trial court did not err, we affirm.

¹ Senior Judge William R. Harris 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.

On January 10, 2008, Lexington-Fayette County Police received information from a trucking company dispatcher that methamphetamine was being manufactured in a hotel room in the Elkhorn area. Patrolling in the area, Officers Hall and Williams positioned themselves in a parking lot across from the hotel and were joined by Officer Hallock and, later, the trucking company dispatcher.

The truck dispatcher stated that Craig Barber, a fellow employee, and Gerald Schwendeman had contacted him about obtaining Sudafed. He further stated that Barber had unsuccessfully attempted to purchase Sudafed at multiple pharmacies. After police obtained Schwendeman's phone number and contacted him, Schwendeman stated that Barber possessed a small amount of methamphetamine, which they had partially smoked. Following this conversation, police were able to lure Barber from his room to the front of the hotel.

Police approached Barber and requested his identification, which he stated was in his room. According to police, Barber appeared nervous, had blood-shot eyes, and had a very dry mouth, which was consistent with using narcotics. After Barber agreed to the police's request to accompany him back to his room, he led them to his room and knocked on the door. When Cynthia Neeley opened the door, police observed a glass container filled with clear liquid, a plastic straw coated with white residue, and smelled a strong chemical odor. Believing he had

discovered contraband, Officer Hall used this information to obtain a search warrant. The search revealed a methamphetamine lab.

On February 26, 2008, Neeley was indicted by a Fayette County grand jury for manufacturing methamphetamine; trafficking in a controlled substance in the first degree; possession of a controlled substance in the first degree; controlled substance endangerment to a child in the fourth degree; and possession of drug paraphernalia in the first degree. On March 27, 2008, Neeley filed a motion to suppress, arguing that the search warrant was not supported by probable cause. Finding that the police's observations of Barber and the hotel room established probable cause, the trial court denied Neeley's suppression motion.

Neeley then entered a conditional guilty plea to possession of a methamphetamine precursor, and her remaining charges were dismissed. She received a sentence of eighteen-months' imprisonment, which was probated for five years. Pursuant to her guilty plea, this appeal followed.

Neeley contends that the trial court's failure to suppress evidence against her violated her rights under the Fourteenth Amendment of the United States Constitution because the Commonwealth was permitted to introduce evidence obtained from an invalid search warrant. Specifically, she contends that Officer Hall's affidavit in support of the search warrant was based on unreliable informants, a lack of experience and proper training, and mere speculation. Thus, she contends that the warrant should have been quashed and the evidence

suppressed. Because we conclude that the search warrant was validly issued, we disagree.

Our standard of review of a trial court's ruling on a motion to suppress requires that we first decide if the trial court's findings of fact are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). If supported by substantial evidence, the findings are conclusive and will not be disturbed. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006). We then conduct a *de novo* review of the trial court's application of the law to the facts to determine whether its ruling was correct as a matter of law. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998).

Both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution guarantee the right to be free from unreasonable searches and seizures, which is effectuated by the general rule prohibiting searches not authorized by a valid search warrant. *Commonwealth v. Wood*, 14 S.W.3d 557, 558 (Ky.App. 1999). When deciding the constitutional validity of issuing a search warrant, the issuing magistrate need only ““make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.”” *Lovett v. Commonwealth*, 103 S.W.3d 72, 77 (Ky. 2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)). Thus, probable cause must exist before a

search warrant can be validly issued. *Dixon v. Commonwealth*, 890 S.W.2d 629, 631 (Ky.App. 1994).

A search warrant can be properly based on a law enforcement officer's observation of contraband if the officer's observation establishes probable cause. If the issuance of a search warrant is based on an officer's observation, the officer cannot have violated a suspect's constitutional rights in arriving at the place where he viewed the alleged contraband and the alleged contraband's incriminating nature must reasonably justify his belief of a crime. *Williams v. Commonwealth*, 147 S.W.3d 1, 7 (Ky. 2004); *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006) (cannot violate constitution in arriving at observation site).

Here, Officer Hall's search warrant affidavit stated that the truck dispatcher provided police with specific information regarding the manufacturing of methamphetamine. Police were able to lure Barber to a public street where he permitted them to follow him back to his hotel room. These types of consensual encounters between police and citizens do not trigger constitutional scrutiny. *Fletcher v. Commonwealth*, 182 S.W.3d 556, 559 (Ky.App. 2005). When Barber obtained access to his room, police observed what they reasonably believed to be a methamphetamine lab. While Neeley contends that the items and substances could have been non-criminal, the trial court properly found that Officer Hall's observations established probable cause of criminal activity.

Additionally, Neeley's contentions that Hall's experience and training with methamphetamine were inadequate and that the affidavit did not establish the

reliability of the informants are misplaced. The probable cause test has always been an objective standard with flexible concepts to be applied in a common-sense manner upon reflection of the totality of the circumstances in each case. *Baltimore v. Commonwealth*, 119 S.W.3d 532, 539 (Ky.App. 2003). Applying this standard, we agree that Officer Hall's total observations supported his belief that the hotel room contained evidence of a crime. Secondly, as the trial court found, despite of the lack of information regarding the informant, Officer Hall's personal observations provided probable cause to support the issuance of the search warrant.

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

COMBS, CHIEF JUDGE, CONCURS.

HARRIS, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Roy A. Durham
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky