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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001592-MR

WILLIAM PETREY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 08-CR-00586

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: William Petrey brings this appeal from a final judgment on a jury trial entered August 26, 2009. Petrey was convicted of four counts of first-degree sodomy, one count of first-degree sexual abuse, one count of possession of marijuana, and one count of possession of drug paraphernalia, for which he received a fifteen-year sentence. Petrey argues on appeal that the trial court committed reversible error by failing to grant his motion to suppress and by failing

to instruct the jury on the lesser-included offense of sexual misconduct. He also contends that his multiple sodomy convictions violated the constitutional prohibition against double jeopardy. After reviewing the record, we conclude that none of these arguments are meritorious. Thus, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case stems from an incident that took place on May 15, 2008. At the time of the events in question, Petrey lived in a multi-unit apartment complex in Park Hills, Kentucky. The victim in this case also lived in the same apartment complex.[1] Both Petrey and the victim were habitual drug users. By her own account, the victim used a litany of drugs, including Oxycontin, Vicodin, and Percocet. She also had an addiction to methadone and had begun visiting a methadone clinic.

Petrey and the victim became friends. According to Petrey, this eventually progressed into a full sexual relationship. Many aspects of this relationship could be described as untraditional. Petrey testified that the two often used sexual devices and included a woman named Kathy Marcum in their activities. Marcum verified this testimony. Petrey and Marcum also testified that drug use frequently preceded these encounters.

At some point prior to May 15, 2008, the victim's live-in boyfriend, Kevin Patterson, received a letter from a man named Jack Marcum. The letter contained information concerning the victim's relationship with Petrey. Marcum

[1] Because of the sensitive nature of this case, the victim's name is withheld.

testified that the victim "freaked out" when Patterson received this letter because he was her sole source for shelter and financial support.

On May 15, 2008, the victim went to Petrey's apartment to smoke marijuana and to request a ride to the methadone clinic. Petrey eventually took her to the clinic, which was in Lawrenceburg, Indiana. Once at the clinic, the victim saw her cousin and claimed that Petrey had raped her by having sex with her while she was unconscious. Her cousin then took her to see the Chief of Police for Park Hills, Ricardo Smith, to report the incident. Chief Smith took a statement from the victim in which she discussed how she had performed oral sex on Petrey in exchange for rides to the clinic in the past, along with other aspects of their sexual encounters. The victim also told Chief Smith that various drugs and drug paraphernalia could be found at Petrey's apartment, along with a videotape showing her being sexually assaulted.

Chief Smith then sought and obtained a search warrant for Petrey's apartment based on the victim's statement. Chief Smith later testified that he was aware that the victim had been to a methadone clinic prior to giving her statement and that she had slurred her words during their conversation, but he did not include anything about this in the affidavit that he submitted to obtain the warrant. During the ensuing search, police found drugs, drug paraphernalia, and a video of Petrey and the victim engaging in a number of sexual acts. The victim appears to be in an unconscious state in the video.

Petrey was subsequently arrested and charged with four counts of first-degree sodomy, one count of first-degree sexual abuse, one count of possession of marijuana, and one count of possession of drug paraphernalia. Petrey was convicted of all seven counts and sentenced to fifteen years' imprisonment. This appeal followed.

STANDARD OF REVIEW

Both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution require probable cause before a warrant to search a home may be issued. In *Commonwealth v. Pride*, 302 S.W.3d 43 (Ky. 2010), the Supreme Court of Kentucky clarified that in considering a motion to suppress evidence obtained pursuant to a search warrant, the trial court must use the "totality of the circumstances" test set forth by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). This requires the trial court to look at the "totality of the circumstances" surrounding the warrant request.

> The task of the [warrant] issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed.

Pride, 302 S.W.3d at 48 (*quoting Gates*, 462 U.S. at 238–39, 103 S. Ct. 2317).

On appellate review of a trial court's ruling regarding a motion to suppress evidence obtained pursuant to a search warrant, this Court is required to employ the following standard of review:

> The proper test for appellate review of a suppression hearing ruling regarding a search pursuant to a warrant is to determine first if the facts found by the trial judge are supported by substantial evidence, RCr 9.78, and then to determine whether the trial judge correctly determined that the issuing judge did or did not have a "substantial basis for ... conclud[ing]" that probable cause existed.

Id. at 49 (*quoting Gates*, 462 U.S. at 236, 103 S. Ct. 2317). In conducting our review of the issuance of the search warrant, we must give great deference to the judge's determination of probable cause. *Id.*; *Gates*, 462 U.S. at 236, 103 S. Ct. at 2331. We note that Petrey does not challenge the trial court's findings of fact, leaving only the probable cause question for our consideration.

In our review of the probable cause issue, we must give great deference to the trial judge's findings, which cannot be reversed unless arbitrarily exercised. *Moore v. Com.*, 159 S.W.3d 325 (Ky. 2005).[2]

As a general rule, we "review the four corners of the affidavit and not extrinsic evidence in analyzing the warrant-issuing judge's conclusion. *Pride*, 302 S.W.3d at 49. Consequently, in most situations when a search warrant has been obtained, an evidentiary hearing is not needed to determine whether the facts alleged in the affidavit are actually true. *Id.* at 49 n.1.

[2] The test for probable cause is whether, under the totality of the circumstances, a fair probability exists that contraband or evidence of a crime will be found in a particular place. *Moore v. Commonwealth*, 159 S.W.3d 325 (Ky. 2005).

> However, when it is alleged that police officers procuring the warrant included intentionally or recklessly false statements *or purposefully or recklessly omitted material facts*, an evidentiary hearing is necessary to determine whether the allegations are true and, if so, whether probable cause exists without the corrupted facts or with the inclusion of the improperly omitted facts.

Id. (Emphasis added). Thus, "[t]o 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." *Com. v. Smith*, 898 S.W.2d 496, 503 (Ky. App. 1995). This same standard applies when the affidavit is alleged to have omitted material facts. *Id.*; *Hayes v. Com.*, 320 S.W.3d 93 (Ky. 2010). "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant." *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978).

ANALYSIS

I

In this appeal, Petrey first argues that the trial court erred by denying his motion to suppress evidence seized from his residence when police executed the aforementioned search warrant. He contends that the affidavit used to obtain the search warrant was inaccurate and unreliable because it did not contain any information regarding the victim being under the influence of drugs or having just visited a methadone clinic at the time of her statement. Because of this "false and misleading" omission, Petrey argues, the warrant-issuing judge did not have a

substantial basis for concluding that probable cause existed meriting a search. Thus, the argument goes, the evidence seized at his apartment merited suppression.

The trial court conducted the requisite evidentiary hearing on Petrey's motion to suppress since Petrey alleged that the affidavit intentionally or recklessly omitted material facts; *i.e.*, the victim's visit to a methadone clinic and use of methadone prior to giving her statement to police. During the hearing, Chief Smith – who was the only witness – acknowledged that the victim told him that she was a methadone user and that she had just left the methadone clinic in Lawrenceburg when he took her statement. He testified that he believed the victim was receiving the methadone in an effort to overcome her addiction to other drugs and that he was unsure of the effects methadone would have on a person. Chief Smith further testified that he had had no previous contact with the victim and did not otherwise know her.

When asked about the victim's condition at the time she gave her statement, Chief Smith testified that she was "excited," "scared," and "crying." He noted that she slurred her words somewhat when answering his questions, but he attributed this to her being "excited" and "upset" about what had happened to her. Chief Smith also testified that she informed him that she had not taken any other drugs, other than what was given to her at the clinic, prior to her arrival at the police station. He also indicated that the victim did not appear to be intoxicated. Chief Smith further testified that the victim appeared to be cognizant of what was going on around her, she responded affirmatively to all questions posed to her, and

she appeared focused on the interview with him. Ultimately, Chief Smith took the victim's allegations seriously and did not believe that her visit to the methadone clinic had impacted her ability to inform her allegation against Petrey. Chief Smith admitted that he did not include any information concerning the victim's visit to the methadone clinic in the affidavit for a search warrant.

For purposes of this case, we need only consider whether the affidavit in question intentionally or recklessly omitted material facts and, if so, whether probable cause still exists upon inclusion of the improperly omitted facts. *Smith*, 898 S.W.2d at 503. On its face, the affidavit is valid and clearly provided the warrant-issuing judge with a substantial basis for concluding that probable cause existed that contraband or evidence of a crime would be found in Petrey's apartment. Indeed, Petrey does not contend otherwise.

Moreover, after considering the record and the parties' arguments, we do not believe that Petrey has overcome the presumption that the affidavit supporting the search warrant was valid. At best, the failure to include the omitted information in the affidavit was negligent or an innocent mistake. "Allegations of negligence or innocent mistake are insufficient" to vitiate a facially-valid affidavit. *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684. As noted by the trial court, Chief Smith testified that nothing about the victim's actions, speech, or attitude led him to believe that she was being untruthful or was intoxicated. In light of this fact, the omission in question does not rise to the level of intentionally or recklessly misleading.

It is also highly questionable whether the victim's recent visit to a methadone clinic, a legal medical treatment for drug addiction, was material to her allegations of rape or would have negated a finding of probable cause. The victim told police that she had been raped by Petrey, had been in Petrey's residence within the previous twenty-four hours, and had seen a variety of drugs. She additionally reported that during this same time, she watched a videotape containing footage of her being sexually assaulted by Petrey and that the videotape was still inside of Petrey's apartment. In light of these facts, the judge would still have a substantial basis for a finding of probable cause – even with inclusion of the omitted information.

Consequently, after careful review of the record, we hold that the trial court did not err by finding that there was substantial evidence supporting the decision to issue a search warrant for Petrey's residence based on the information contained in the subject affidavit. Petrey's argument that the affidavit supporting the warrant intentionally or recklessly omitted material facts is rejected.

II

Petrey next argues that the trial court erred by failing to instruct the jury on sexual misconduct as a lesser-included offense of first-degree sodomy. This offense is encompassed by Kentucky Revised Statutes (KRS) 510.140(1), which provides: "A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent." Petrey notes that in this case the basis of the sodomy charges

was that the victim was incapable of giving consent because she was physically helpless. Petrey contends that since he put on evidence challenging this assertion by showing that the victim remained aware of her surroundings at the time of the subject acts, an instruction on sexual misconduct was merited. We disagree.

Our longstanding rule is that KRS 510.140 applies only to cases "where the victim is fourteen or fifteen and the defendant less than twenty-one, or where the victim is twelve-to-fifteen and the defendant is less than eighteen years of age." *Johnson v. Com.*, 864 S.W.2d 266, 277 (Ky. 1993); *see also Deno v. Com.*, 177 S.W.3d 753, 762-63 (Ky. 2005); *Cooper v. Com.*, 550 S.W.2d 478, 480 (Ky. 1977). Because both Petrey and the victim were of majority age at the time of the subject offenses, the trial judge's refusal to instruct the jury on sexual misconduct was not erroneous. *Deno*, 177 S.W.3d at 763.

III

Petrey finally argues that his being convicted of four separate counts of sodomy violated the constitutional prohibition against double jeopardy. Petrey specifically contends that although he and the victim engaged in various acts of deviate sexual intercourse, these constituted one continuous sexual act for purposes of prosecution. Therefore, three of his convictions for sodomy must be vacated. We disagree.

In *Van Dyke v. Commonwealth*, 581 S.W.2d 563 (Ky. 1979), the defendant argued that two convictions of rape and a conviction of sodomy should have been merged into a single conviction of rape because all of the offenses

occurred during one continuous sexual assault against the same victim. The Supreme Court of Kentucky held that although the acts in question occurred in the span of approximately fifteen minutes and involved the same victim, this did not prohibit multiple convictions. The Court explained its reasoning as follows:

> The evidence clearly discloses that Van Dyke committed three distinct offenses – rape, sodomy and a second rape when he penetrated Mrs. Lyles' vagina to accomplish the first act of intercourse, penetrated her mouth to accomplish the act of sodomy, and thereafter penetrated her vagina to accomplish the second act of intercourse. The legislature intended to punish each separate act of rape or sodomy. The fact that the acts occurred in a brief period of time with the same victim and in a continuum of force does not protect Van Dyke from prosecution and conviction of each separate offense.

Id. at 564. The logic used by the Supreme Court in *Van Dyke* is equally applicable in this case and is dispositive of the issue before us.

The jury was instructed on, and Petrey was convicted of, four different and distinct acts of deviate sexual intercourse, each of which constitutes first-degree sodomy: (1) inserting a "white sex toy" into the victim's anus; (2) inserting a "wood sex toy" into the victim's anus; (3) rubbing his penis in and/or on the victim's mouth; and (4) placing his mouth on the victim's vagina. Although these acts "occurred in a brief period of time with the same victim and in a continuum of force," *Van Dyke* requires them each to be treated as a separate and discrete act of sodomy. *Id.* Therefore, Petrey's prosecution and subsequent

conviction for four counts of sodomy did not violate the constitutional prohibition against double jeopardy.[3]

CONCLUSION

For the foregoing reasons we affirm the judgment of the Kenton Circuit Court.

CLAYTON, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS AND WRITES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING: I concur based on the arguments presented to our Court concerning the validity of the search warrant. I write separately to specifically note that no argument was made that the affidavit in support of the search warrant did not contain any statements by the officer/affiant that: (1) an independent investigation was made to corroborate the information provided to the officer by the victim/informant; or (2) from which the veracity of the victim/informant could be determined. The search warrant was issued on the uncorroborated statements of the victim, as an informant, without even a bare recitation therein that the victim was a reputable source of the facts upon which the officer sought the search warrant.

[3] William Petrey cites to Kentucky Revised Statutes 505.020(1)(c) to support his argument. However, this provision does not apply in this case since it is specifically aimed at offenses proscribing a continuing course of conduct taking place over time – for example, failing to pay child support. First-degree sodomy is not such an offense. *See Van Dyke v. Commonwealth,* 581 S.W.2d 563 (Ky. 1979).

Similarities can be drawn between the facts *sub judice* and those in *U.S. v. Dyer*, 580 F.3d 386 (6th Cir. 2009). Therein the majority of the court found a search warrant based upon an affidavit reciting unverified facts to be valid based upon the fact that the officer knew the person reporting the criminal activity, despite a strong dissent to the contrary. The court stated that, "[W]hen the majority of the information in the affidavit comes from confidential sources, as it does in this case, courts 'must consider the veracity, reliability, and the basis of knowledge for that information as part of the totality of circumstances.'" *Dyer* at 390 (citing *United States v. Helton*, 314 F.3d 812, 819 (6th Cir.2003)). "While independent corroboration of a confidential informant's story is not a *sine qua non* to a finding of probable cause, in the absence of any indicia of the informants' reliability, courts insist that the affidavit contain substantial independent police corroboration." *Dyer* at 390, 391(citing *U.S. v. Frazier*, 423 F.3d 526, 532 (6th Cir.2005)).

Certainly, the preference would be for the affidavit to have statements of both the independent investigation and corroboration by the officer of at least some of the facts related to him by the informant and a recitation setting forth facts from which the veracity of the informant could be determined. This would give some modicum of protection and support to our Fourth Amendment freedoms. While the facts below present a compelling factual scenario for the issuance of a search warrant, the costs associated with abandoning our Fourth Amendment protections in issuing a search warrant based upon a bare bones affidavit are too

much for us to bear. Regardless, I concur based on the arguments presented to our court.

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