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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001620-MR

ROGER HOLSEY, JR. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 09-CR-01562

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, Roger Holsey, entered a conditional guilty plea in the Fayette Circuit Court to trafficking in marijuana less than 8 ounces and possession of drug paraphernalia. He now appeals *pro se*[1] to this Court,

[1] Appellant was appointed counsel to represent him on appeal. However, by order entered March 15, 2011, this Court granted his motion to dismiss counsel and proceed *pro se*.

challenging the trial court's denial of his suppression motion. Finding no error, we affirm.

In June 2009, Detective J.S. Curtsinger, a Lexington Fayette Urban County Police Officer, was informed by another officer, Detective Brislin, that a "concerned citizen" suspected that narcotics were being sold from a residence located at 3685 White Pines Drive in Lexington, Kentucky. In conducting surveillance of the residence, Detective Brislin observed a white Dodge Magnum that he determined was registered to Appellant or a Kathleen Parks. Detective Curtsinger recalled seeing the same vehicle parked on numerous occasions at 460 Newbury Way, another residence located less than a mile from White Pines Drive.

On July 13, 2009, Detective Curtsinger conducted a trash pull[2] at the Newbury Way residence and found marijuana stems, rolling papers, an empty plastic baggie contained marijuana residue, and mail addressed to Christina Hamm, Appellant's wife. The following day, Detective Curtsinger executed a search warrant on the White Pines residence and discovered not only marijuana but a large mushroom growing operation. On July 20, 2009, a second trash pull at the Newbury Way residence resulted in marijuana stems, numerous baggies containing marijuana residue, rolling papers, and mail addressed to Appellant. A subsequent

criminal background investigation indicated that Appellant was on parole from 1999 convictions for first-degree robbery, first-degree burglary, possession of

[2] A "trash pull" occurs when police conduct a search of one's trash can placed at the curb for collection. Appellant herein does not challenge the legality of the trash pulls.

marijuana, and possession of drug paraphernalia. In addition, Christina Hamm had a prior conviction for trafficking in a controlled substance.

Based upon the above information, Detective Curtsinger obtained and executed a search warrant on the Newbury Way residence on July 20, 2009. Officers discovered marijuana, baggies with marijuana residue, digital scales, and other drug paraphernalia. Appellant was subsequently indicted for trafficking in marijuana within a 1000 yards of a school, possession of drug paraphernalia, second offense or greater, and for being a second-degree persistent felony offender. Following a May 2010 hearing, the trial court denied Appellant's motion to suppress all evidence found during the search. Appellant thereafter entered a conditional guilty plea to an amended charge of trafficking in marijuana less than eight ounces, as well as possession of drug paraphernalia. Pursuant to a plea agreement, the PFO charge was dismissed and Appellant was sentenced to one year imprisonment, probated for a period of four years. This appeal ensued.

Appellant first argues that the affidavit supporting the search warrant for his residence was deficient in that it failed to establish probable cause. Specifically, Appellant points out that the "concerned citizen" who suspected drug trafficking at White Pines Drive was never identified, and further that there was no assertion that Appellant had any connection to said residence. Thus, Appellant concludes that because there was no nexus established between him and the White Pines address, there was no probable cause for issuance of the warrant. We disagree.

In *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the United States Supreme Court enunciated a "totality of the circumstances" approach to determining probable cause related to search warrants:

> 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 . . . 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. (Citation omitted)

Id. at 238–239, 103 S.Ct. at 2332. "A magistrate's determination of probable cause should be paid great deference by reviewing courts." *Id.* at 236, 103 S.Ct. at 2331. (Citation omitted).

The Kentucky Supreme Court adopted the *Gates* standard in *Beemer v. Commonwealth*, 665 S.W.2d 912, 914 (Ky. 1984). Thus, a "trial court judge faced with a motion to suppress evidence obtained pursuant to a search warrant should apply the *Gates* standard, and determine whether under the 'totality of the circumstances' presented within the four corners of the affidavit, a warrant-issuing judge had a substantial basis for concluding that probable cause existed." *Commonwealth v. Pride*, 302 S.W.3d 43, 49 (Ky. 2010).

The proper test for appellate review of a suppression hearing ruling regarding a search pursuant to a warrant is to first determine if the facts found by the trial court are supported by substantial evidence, RCr 9.78, *see also Commonwealth. v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). The second

inquiry is whether the court correctly determined that the issuing judge did or did not have a "substantial basis for ... conclud[ing]" that probable cause existed. *Gates*, 462 U.S. at 236, 103 S.Ct. 2332; *see also Beemer*, 665 S.W.2d at 915. A reviewing court must give due weight to inferences drawn from the facts by the trial court and law enforcement officers and to the court's findings on the officers' credibility.

In *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005) our Supreme Court further explained:

> Courts should review the sufficiency of an affidavit underlying a search warrant in a commonsense, rather than hypertechnical, manner. The traditional standard for reviewing an issuing judge's finding of probable cause has been that so long as the magistrate had a substantial basis for concluding that a search warrant would uncover evidence of wrongdoing, the Fourth Amendment requires no more. (Citations omitted).

Finally, we acknowledge that our review must be in light of the Constitutional preference for warrants. "The great deference to the decision making ability of the warrant-issuing judge stems from the preference we have for searches conducted pursuant to a warrant rather than warrantless searches." *Pride*, 302 S.W.3d at 48. *See also Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984).

Appellant is correct that a mere allegation of suspected drug activity by an unknown individual is insufficient to establish probable cause. In fact, the trial court found that the first part of the affidavit provided a very small link at best to

Appellant. The vehicle that was spotted leaving the White Pines Drive area was indeed registered to Appellant and was observed parked at the Newbury residence on several occasions. Nevertheless, if Detective Curtsinger had ended his investigation at that point, we would probably agree with Appellant that there would not have been probable cause for a search warrant to be issued. However, Detective Curtsinger corroborated his information by conducting two trash pulls, both of which produced evidence of drug activity at the Newbury Way residence. In fact, the trial court expressly found during the suppression hearing that the discovery of illegal contraband in trash placed outside the curtilage was, in and of itself, sufficient to create probable cause of criminal activity. We agree and, as such, have no difficulty in concluding that the trial court correctly determined that, under the totality of the circumstances, there was probable cause for the issuance of the search warrant.

Appellant next argues that police had insufficient grounds to request a no-knock warrant. Appellant contends that there was no evidence that he or his wife would be armed, or that the destruction of contraband was imminent. Thus, he concludes that the issuance of a no-knock warrant was erroneous. Again, we disagree.

"[T]he Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry." *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (*Citing Wilson v. Arkansas*, 514 U.S. 927, 933, 115

S.Ct. 1914, 1918, 131 L.Ed.2d 976 (1995)). However, as noted by the *Adcock* Court, police may justify a no-knock entry if they have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. *Adcock*, 967 S.W.2d at 9 (*Citing Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 1421-22, 137 L.Ed.2d 615 (1997).

The trial court herein found that the no-knock warrant was justified because there was sufficient evidence that drugs were present in the residence, and such could easily and quickly be destroyed. Furthermore, because Appellant had a previous conviction for robbery with a handgun, there was a reasonable probability that weapons were also present in the residence. Simply because officers did not find any weapons does not negate the reasonable belief that knocking and announcing their presence could place them in danger. Again, great deference is afforded the issuing judge and we find no grounds to disturb his decision that a no-knock warrant was proper.

Finally, Appellant complains that the search warrant was defective because Judge Bouvier, who signed the warrant, was not a neutral or detached authority as required by the Fourth Amendment. *See Rooker v. Commonwealth*, 508 S.W.2d 570 (Ky. 1974). Appellant contends that because Judge Bouvier was the prosecutor in Appellant's 1999 trial and successfully obtained a twenty year

conviction therein, he could not have fairly and impartially reviewed the affidavit supporting the search warrant.

Contrary to Appellant's contention, the mere fact that the issuing judge served as the prosecutor in a previous case against him does not indicate that the judge was anything other than impartial and unbiased. More specifically, no evidence existed of judicial partiality such as that resulting from a judge's ongoing involvement in police or prosecutorial activities, *see Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), or emanating "from some 'extrajudicial source' rather than from participation in judicial proceedings." *See Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985). Appellant is not entitled to relief on this ground.

For the reasons set forth herein, the order of the Fayette Circuit Court denying Appellant's suppression motion is affirmed.

ALL CONCUR.

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