RENDERED: DECEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001671-MR

TERRY BENNETT — APPELLANT

v.

APPEAL FROM OWSLEY CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 11-CR-00048

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

ACREE, CHIEF JUDGE: Terry Bennett entered an *Alford*[1] plea of guilty to an amended charge of criminal attempt to commit manufacturing methamphetamine, conditioned on his right to appeal the Owsley Circuit Court's denial of his motion to suppress evidence. The sole issue on appeal is whether the circuit court properly

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

applied the "good faith" exception to the search warrant used to obtain the evidence against Bennett. We affirm the trial court's ruling.

Bennett was charged with manufacturing methamphetamine after incriminating items were found in his residence during the execution of a search warrant by the Owsley County Sheriff's Department and the Kentucky State Police. Bennett filed a motion to suppress the evidence on the basis that the affidavit supporting the search warrant was defective. By agreement of the parties, no hearing was held on the motion. The trial court determined the affidavit lacked sufficient indicia of probable cause, and that the issuing commissioner did not have a substantial basis for concluding that a search would uncover evidence of wrongdoing. The court nonetheless ruled that the evidence should not be suppressed under the "good faith" exception established by *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Bennett entered his conditional plea, and this appeal followed.

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002) (footnotes omitted).

To pass muster under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution, an affidavit for a search

warrant must "reasonably describe the property or premises to be searched and state sufficient facts to establish probable cause for the search of the property or premises." *Coker v. Commonwealth*, 811 S.W.2d 8, 9 (Ky. App. 1991) (internal citation omitted). "[T]he test for probable cause is whether there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005).

"Historically, a violation of the Fourth Amendment required the automatic suppression of the evidence seized." *Hensley v. Commonwealth*, 248 S.W.3d 572, 577 (Ky. App. 2007). However, we have refined the use of suppression to ensure it serves the purpose for which it was created. Suppression is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Crayton v. Commonwealth*, 846 S.W.2d 684, 687 (Ky. 1992) (quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974)).

In *United States v. Leon*, the United States Supreme Court revised the automatic suppression rule and created the "good faith" exception, holding that an officer's reasonable reliance on a search warrant issued by a neutral and detached magistrate could save evidence from being excluded even if the warrant was later determined to be deficient for lack of probable cause. *Hensley*, 248 S.W.3d at 577 (discussing *Leon*, 468 U.S. 897, 104 S.Ct. 3405). The *Leon* Court reasoned "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant

cannot justify the substantial costs of exclusion." 468 U.S. at 922, 104 S.Ct. at 3420. *Leon* further emphasized the exclusionary rule's purpose is to prevent *police* misconduct, and not to "punish the errors of judges and magistrates." *Id.* at 916, 104 S. Ct. at 3420. Put simply, evidentiary exclusion is strong medicine, necessary only in situations where it will discourage police from committing future transgressions against the Fourth Amendment. *See Calandra*, 414 U.S. 338, 94 S.Ct. 613.

The good faith exception does not apply to every situation where a magistrate grants a defective warrant. Evidence may still be excluded if: (1) the affidavit contains "false or misleading information"; (2) the judge who issued the search warrant has abandoned his "detached and neutral role"; (3) the affidavit is so lacking in indicia of probable cause such that the officer's reliance cannot be reasonable; or, (4) the warrant is "facially deficient by failing to describe the place to be searched or the thing to be seized." *Commonwealth v. Opell*, 3 S.W.3d 747, 752 (Ky. App. 1999).

Bennett argues the third possibility exists here: the affidavit in his case was so lacking in indicia of probable cause that the officer's reliance on it could not be reasonable. To succeed in this argument, Bennett must demonstrate that suppression is appropriate because "the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Leon*, 468 U.S. at 926, 104 S.Ct. at 3422.

The warrant was issued on the basis of an affidavit submitted to the Owsley County Trial Commissioner by Owsley County Deputy Michael Havicus. The affidavit stated as follows:

> On the 14th day of September 2011 approximately 2:00 pm affiant received information from / observed: A confidential informant wherein the informant advised the affiant by a written statement after receiving information that Terry Bennett at his residence is trafficking drugs and Manufacturing Methamphetamine. The Informant advised Officers that he has seen the precursors for Manufacturing Methamphetamine inside the residence.
>
> The affiant conducted the following independent investigation which was driving to the location of the building in question to verify that the location and description matched the description given by the confidential informant.

The trial court concluded that the affidavit was so lacking in the indicia of probable cause that it was error on the commissioner's part to issue a warrant. Specifically, the trial court found that the affidavit lacked a statement as to the veracity of the informant, there was no explicit and detailed description of the wrongdoing, there was no time of observation listed in the affidavit, and the officer's investigation was inadequate because it consisted only of verifying that a house was located at the address provided by the confidential informant. While the trial court criticized the warrant's technical sufficiency, it did not believe the officer engaged in bad faith when he relied on the warrant. The trial court stated:

> What tips the scales in the Defendant's favor and what makes the Court feel there was not a substantial basis for concluding that there would be evidence of the crime, although there was a basis for concluding same, was the

> lack of a detailed description of the alleged wrongdoing. There was not much more of an investigation, but the officer could not do much more than he did. He could not just "hang out" outside the house for very long. The absence of a detailed description of alleged wrongdoing by the informant, coupled with the lack of a statement as to the informant's reliability, makes the basis for concluding that there would be evidence of a crime to be less than substantial. That does not mean the officer was not in good faith.

Bennett argues that a reasonably well-trained officer would have known that the trial commissioner erred in granting the warrant. Bennett cites a number of investigatory steps he could have taken, such as arranging for a controlled buy with the confidential informant, using audio or visual recording equipment; conducting a "knock and talk" on the premises; running the records of pseudoephedrine purchases to determine if Bennett had purchased precursors; or simply conducting surveillance for longer than it would take to verify the house number at the location. Bennett contends that the officer's failure to do additional independent investigation, and the lack of specific information in the search warrant, means that he could not have reasonably believed that he had presented the trial commissioner with enough information to substantiate probable cause.

In *Crum v. Commonwealth*, the Kentucky Supreme Court declined to apply the good faith exception to a warrant issued under circumstances comparable to this case. 223 S.W.3d 109 (Ky. 2007). In *Crum*, the affidavit described with adequate particularity the location of the property to be searched. However, the warrant allowed for a blanket search of the home because the things to be seized

were described vaguely as "illegal contraband." Further, in the *Crum* affidavit, the informant was not named, and the officer's reason for believing the informant to be reliable was not stated. The affidavit described the officer's independent investigation as consisting of "information" received from a deputy sheriff without stating the nature of that information. The Court stated that, "[o]n the whole, it is impossible to tell the basis of the officer's knowledge or exactly what he is looking for." *Crum*, 223 S.W.3d at 112.

By contrast, the affidavit in this case was more thorough than that in *Crum*. The affidavit limited the scope of what police were looking for by specifically referring to the things to be seized as "precursors of methamphetamine." Although it did not name the person who provided the information to the officer, it did describe that individual as a confidential informant who provided a written statement. Finally, Officer Havicus performed an independent investigation in an attempt to corroborate the information. Certainly, that investigation was minimal, but he did not rely solely on "information" from an unnamed fellow officer. These additional circumstances of this investigation distinguish it from *Crum* and support the trial court's determination that police reliance on the warrant in this case was in good faith.

Determining that a warrant was granted improvidently is not the same as determining whether the officers who relied on that warrant did so in good faith. Finding objective good faith on the officer's part requires a less demanding showing than a showing of probable cause; if it were not so, the *Leon* "good faith"

exception would be "devoid of substance." *United States v. Bynum*, 293 F.3d 192, 195 (4th Cir. 2002). Here, a police officer was provided a tip from a confidential informant with first-hand knowledge of methamphetamine precursors in Bennett's home. The officer conducted a brief investigation to corroborate the tip and presented his findings to the trial commissioner who granted the warrant. While ultimately the trial commissioner was incorrect in granting the warrant, that mistake is not attributable to the police in this case. A reasonably well-trained police officer could assume, in good faith, that an eye-witness tip combined with an independent investigation was sufficient to convince the neutral magistrate. This reasoning is consistent with the exclusionary rule's aim of deterring police misconduct, not judicial error. "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Leon*, U.S. 468, at 921, 104 S.Ct. at 3419. The trial court did not err in denying Bennett's motion to suppress.

The Owsley Circuit Court's judgment is affirmed.

ALL CONCUR.

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