

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-002004-MR

DAVID McINTOSH

APPELLANT

v. APPEAL FROM OWSLEY CIRCUIT COURT  
HONORABLE THOMAS P. JONES, JUDGE  
ACTION NO. 11-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, LAMBERT, AND THOMPSON, JUDGES.

COMBS, JUDGE: David McIntosh appeals from the September 12, 2012, judgment of the Owsley Circuit Court following his conditional plea of guilty to the charge of unlawful possession of a precursor to methamphetamine. He conditioned his plea upon the right to appeal the trial court's denial of his motion to suppress evidence. After our review, we affirm.

On May 27, 2011, Kentucky State Police Trooper Jarrod Smith was working in Booneville to locate a stolen vehicle and/or Isaac Gabbard, a suspect in the recent car theft. Trooper Smith was accompanied by a local constable who advised that Gabbard and McIntosh, the appellant, were friends and that McIntosh might know where Gabbard could be found. The constable directed Trooper Smith to McIntosh's residence on Beech Fork Road.

When he arrived at McIntosh's address, Trooper Smith noticed an active burn pile several feet from the residence and a smell of ether emanating from the home. He also observed a "water bottle generator" on the front porch. Trooper Smith immediately associated his observations with the production of methamphetamine.

Trooper Smith knocked at the door, but no one answered. While he applied for a search warrant, Trooper Smith left the constable and the state trooper who had answered his call for assistance to establish a perimeter at the premises.

In the affidavit tendered in support of the warrant, Trooper Smith indicated that he had reasonable grounds to believe that "[i]llegal drugs, chemical agents or products used in the manufacture of illegal narcotics. . ." could be found at the property and on the persons at the residence. Based upon Trooper Smith's representations, a search warrant issued and was immediately executed.

During the search, various incriminating items were recovered, including coffee filters and small plastic bags (all laced with methamphetamine residue) and

the “water bottle generator.” McIntosh was subsequently indicted on numerous charges and arrested.

Following his arraignment, McIntosh filed a motion to suppress the evidence obtained during the search. McIntosh contended that the search warrant affidavit was overly broad and that the warrant was not supported by probable cause. After a hearing that included the testimony of Trooper Smith, the trial court determined that the judge who had issued the warrant had a substantial basis for concluding that probable cause existed to justify it. Consequently, the motion to suppress was denied.

On August 3, 2012, McIntosh entered a guilty plea, specifically reserving his right to appeal the court’s denial of his motion to suppress. Judgment was entered on September 12, 2012, and McIntosh was sentenced to serve five-year’s imprisonment. This appeal followed.

A search warrant must contain information based on probable cause that contraband or evidence of a crime will be found at a particular location. *Beemer v. Commonwealth*, 665 S.W.2d 912 (Ky. 1984). McIntosh argues on appeal that the trial court erred by denying his motion to suppress the evidence seized pursuant to the warrant because Trooper Smith did not have probable cause to believe that contraband or evidence of a crime would be found at his residence. He also contends that the affidavit tendered by Trooper Smith was overly broad since it merely identified the residence and that it failed to identify which person inside that residence would be questioned. We disagree with each of these assertions.

Upon our review, we are required to defer to the authority of the official issuing the warrant as to the existence of probable cause. *Moore v. Commonwealth*, 159 S.W.3d 325 (Ky. 2005). In determining whether there is probable cause, the issuing judge must “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 (1983)). The trial court’s findings of fact following a suppression hearing shall be conclusive if “supported by substantial evidence.” Kentucky Rules of Criminal Procedure 9.78. However, the trial court’s application of the law to the facts is reviewed *de novo*. *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky. App. 2002).

There is nothing in the record to indicate that the judge who issued the warrant in this case acted arbitrarily by concluding that probable cause existed to search McIntosh’s residence. In seeking the search warrant, Trooper Smith cited the identifiable odor of ether emanating from the home, coupled with the presence of a nearby burn pile and an active “water bottle generator.” Thus, there were more than adequate grounds for the judge to believe that there was a fair probability that evidence of a crime would be found at McIntosh’s property. See *Drake v. Commonwealth*, 222 S.W.3d 254 (Ky. App. 2007) (holding that the smell of ether alone can provide the probable cause necessary to support issuance of a warrant).

Next, McIntosh contends that the affidavit tendered by Trooper Smith was overly broad since it failed to identify a place to search more specific than the residence, and it failed to identify which person inside would be questioned. These contentions have no legal merit and no basis in fact.

Pursuant to the provisions of the Fourth Amendment of the U.S. Constitution and Section 10 of the Kentucky Constitution, a search warrant must describe with particularity the place to be searched. This particularity requirement is satisfied if the description in the warrant enables the officer executing the warrant to identify the place to be searched with reasonable effort. *Duff v. Commonwealth*, 464 S.W.2d 264 (Ky. 1971).

Trooper Smith's affidavit contained a street address and a detailed description of the premises to be searched. The address and description were incorporated into the warrant. When Trooper Smith returned to the residence to execute the search warrant, he readily identified the premises to be searched pursuant to the warrant. The contents of the affidavit adequately identified the location to be searched, and the warrant conformed to the particularity requirement of Section 10 of the Kentucky Constitution and the Fourth Amendment of the U.S. Constitution. *See McCloud v. Commonwealth*, 279 S.W.3d 162 (Ky. App. 2007) (holding that a search warrant flawed by an incorrect street address nevertheless meets constitutional standards).

McIntosh cites no authority for the proposition that an affidavit is

insufficient if it fails to identify *the precise room* within a residence in which drugs or other contraband may be found. Furthermore, it is not essential that the affidavit for a search warrant -- or the warrant itself -- should designate the suspected person or the owner or individual in control and possession of the property to be searched. *Henry v. Commonwealth*, 228 S.W.2d 32 (Ky. 1950).

In the case before us, the affidavits established ample facts to support a finding of probable cause that contraband would be found on the premises described in the warrant. The trial court did not err by concluding that the search satisfied constitutional criteria.

The judgment of the Owsley Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jason A. Hart  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Heather M. Fryman  
Assistant Attorney General