RENDERED: DECEMBER 19, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000274-MR

DAMON L. GIDRON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 10-CR-003116

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER[1] AND THOMPSON, JUDGES.

KRAMER, JUDGE: Damon L. Gidron appeals following the Jefferson Circuit Court's order denying his motion to suppress evidence seized pursuant to a valid warrant. After careful review, we affirm.

[1] Judge Joy A. Kramer, formerly Judge Joy A. Moore.

On July 23, 2008, Detective Steven Presley, relying on information he received from a confidential informant, and on an independent investigation, executed an affidavit for a search warrant that reads in relevant part:

> Within forty eight hours of this warrant being signed the affiant was given information by a reliable confidential informant pursuant to Kentucky Rules of Evidence #508 that a black male known as Damon Lamont Gidron sells powder cocaine and that he keeps cocaine at 7503 Garrison Road Louisville, Jefferson County Kentucky 40214 USA. This confidential informant wishes to remain anonymous for fear of his/her safety.
>
> Acting on the information received, affiant conducted the following independent investigation:
>
> Acting upon a complaint received in the Narcotics unit of narcotics being sold from 7503 Garrison Road #2 Louisville, KY 40214, affiant and detectives conducted surveillance at 7503 Garrison Road #2 Louisville, Jefferson County Kentucky 40214 USA and observed heavy vehicular and pedestrian traffic going to and from residence. Pedestrians would walk up to the front door and enter apartment #2 in view of detectives. After a brief period of time, the pedestrians would leave on foot or in a vehicle. This type of activity is indicative of narcotics trafficking. At the direction of the Affiant, a reliable confidential informant purchased a quantity of cocaine from Damon Lamont Gidron. The reliable confidential informant was searched prior to the controlled buy for any narcotics or money on person by detectives. The confidential informant then immediately met with Detectives and turned over the quantity of cocaine the informant had purchased. The reliable confidential informant was wearing monitoring equipment and Detectives could hear the transaction occur at 7503 Garrison Road #2. Damon Lamont Gidron has had narcotic convictions for trafficking cocaine since 1997. The above occurred in Louisville, Jefferson County, Kentucky USA.

The Jefferson District Court judge reviewed the affidavit and granted the search warrant. Executing the warrant the same day, police officers discovered approximately seven grams of cocaine, a "baggy" of marijuana, a bag of various pills, and $1,038.00 in cash. Following the denial of his motion to suppress the fruits of the search, Gidron entered a conditional guilty plea to trafficking in a controlled substance in the first degree and was sentenced to seven years' imprisonment.

On appeal Gidron's sole argument is that there was no probable cause basis for police to obtain a search warrant for his home. He insists that the affidavit's mere conclusory statements did not support a finding of probable cause. We disagree.

In *Beemer v. Commonwealth,* 665 S.W.2d 912 (1984), Kentucky adopted the United States Supreme Court's totality of the circumstances approach for determining whether probable cause exists to issue a search warrant. Under this approach, the issuing judge should "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." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2328 (1983). The task of this court upon review is not to conduct a *de novo* determination of probable cause, but to 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 (2010). The issuing official's "determination of probable cause should be paid great deference by the reviewing court." *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331 (quoting *United States v. Spinelli*, 393 U.S. 410, 89 S.Ct. 584 (1969)).

Gidron first argues that there was no basis for the reliability of the confidential informant and that the assertion that the confidential informant was reliable was conclusory. He reminds this Court that before the judge can find probable cause based on a confidential informant tip, the court "must have a basis for finding that the information is reliable, truthful, and in a position to know the information provided." *United States v. Dyer*, 589 F.3d 386, 390 (6th Cir. 2009). He further notes that the United States Supreme Court has instructed that when determining probable cause, the issuing official's "action cannot be a mere ratification of the bare conclusions of others." *Gates*, 462 U.S. at 239, 103 S.Ct. at 2333.

Based on the information provided in the affidavit, we are convinced that the issuing judge properly concluded that there was a substantial basis for finding that the confidential informant's information was reliable. The Kentucky Supreme Court has held that reliability does not necessarily imply a pattern of behavior or history; reliability can be obtained from the confidential source giving police officer's information, and that information turning out to be true. *Blane v. Commonwealth*, 364 S.W. 3d 140, 147 (Ky. 2012). Here, the affidavit stated that a confidential informant informed officers that "a black male known as Damon

Lamont Gidron sells powder cocaine that he keeps at his residence." This statement alone is indeed conclusory and fails to provide a basis on which the issuing judge could conclude that the informant was reliable. However, the affiant went on to assert that the confidential informant later made a successful, police monitored, controlled drug buy from Gidron. Therefore, the informant's information proved to be true, thereby establishing the reliability of the confidential informant. Because the affiant provided a basis on which he made his assertion that the informant was reliable, appellant's claim that the statement was conclusory is without merit.

Gidron further argues that the observations by the detective failed to corroborate the informant's reliability because the affidavit was silent about what the detective heard during the controlled buy that would have allowed him to conclude that Gidron supplied the informant with cocaine. Again, we are unpersuaded.

The United States Supreme Court explained in *Gates*, that the task of the issuing judge 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." 462 U.S. at 238, 103 S.Ct. at 2332. Here, the officer stated in his affidavit that police searched the confidential informant for cocaine before he went into the given residence, the police monitored the buy, and when the informant came out of the residence, he had a quantity of what the officer believed to be cocaine. The

informant's information was corroborated and his reliability established when the informant purchased cocaine from the address provided. Search warrants are issued with respect to a particular place. *See Gates,* 462 U.S. at 238,103 S.Ct. at 2332. While evidence of what was said during the controlled buy that caused officers to believe Gidron sold the cocaine may have strengthened the informant's reliability, it was not necessary to establish that reliability. The information given by the informant that there were drugs in Gidron's residence proved correct and was one of the many factors providing probable cause to search the residence. Guided by common-sense, the judge was not unreasonable in determining that the information given by the confidential informant was reliable based on the corroborated assertion that cocaine would be found in Gidron's residence.

Gidron next claims that corroboration did not occur because the affidavit did not say that the substance was field tested. Nor did the affidavit include information about the officer's training in narcotics detection that would have made him better qualified to determine that the purchased substance was in fact cocaine. By insisting in his brief that "despite these facts, officers swore under oath that cocaine had been purchased," Gidron implies that the affiant purposely mislead the issuing judge. The trial court found that the affidavit did not contain intentionally or recklessly false statement and that, given the totality of the circumstances, officers had a good faith belief that the substance purchased was cocaine, or at a minimum, that the defendant represented the substance to be cocaine. We agree.

In *Franks v. Delaware*, the United States Supreme Court held that "if an allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided . . . ." 438 U.S. 154, 156, 98 S.Ct. 2674, 2676 (1978).

In this case, Gidron offers no evidence, beyond the fact that the substance was not field tested, to prove by preponderance that the information given to the issuing judge was knowingly or recklessly false. The Court in *Franks* stated that the information in the affidavit must be "'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Id.* Considering the officers' history of dealing with drugs in a law enforcement setting, the information from the informant, the heavy foot traffic in and out of the residence, the monitored controlled buy, and Gidron's prior drug offences, it would have been unreasonable for the officer to conclude that a substance resembling cocaine, purchased in a controlled drug buy from a known drug offender's residence, was anything other than what it was purported to be.

Even had Gidron met his initial burden of proving by preponderance that the information was knowingly or recklessly false, the trial court correctly found that, purged of the false statement, probable cause remained sufficient for the grant of a search warrant. Substituting "cocaine" with "purported cocaine" the

affidavit would continue to sufficiently establish probable cause based on a common-sense evaluation of the totality of the evidence.

Gidron insists that he is entitled to a hearing on whether the affidavit contains intentional or recklessly false statements. However, no hearing is required unless a defendant "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth was included by the affiant in the warrant affidavit . . . ." *Franks*, 438 U.S. at 155-156, 98 S.Ct. at 2676. Gidron did not meet this burden.

Finding probable cause to issue a warrant "simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process." *Gates*, 462 U.S. at 231, 103 S.Ct. at 2328 (citing *Jaben v. United States*, 381 U.S. 214, 224-225, 85 S.Ct 1365, 1371(1965)). We are convinced that the affiant's statements are supported by substantial evidence and are not merely conclusory. The trial judge correctly determined that based on the totality of the evidence sworn in the affidavit, the issuing judge had a substantial basis for concluding that probable cause existed to issue a search warrant.

Based on the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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