

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000644-MR

DARNELL A. MALONE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE, BRIAN C. EDWARDS JUDGE
ACTION NO. 11-CR-003549

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND D. LAMBERT, JUDGES.

D. LAMBERT, JUDGE: Darnell Malone was found guilty of one count of trafficking in a controlled substance (cocaine), over four grams, and received a probated five-year sentence. Malone appeals as a matter of right, arguing that the trial court erroneously denied his motion to suppress evidence obtained by an improper search and seizure and that the trial court erroneously failed to grant his motion for a directed verdict. We affirm.

FACTS

On July 22, 2011, Louisville Metro Police officers executed a search of a residence located at 4930 South Third Street in Louisville, Kentucky. When officers arrived at the residence, a male, later determined to be Malone, ran out of the front door and through the front yard where he was apprehended by one of the detectives. As he was running, Malone threw a set of keys, which police officers recovered and determined opened the front door to the residence.

Malone was taken back inside and secured while the officers searched the residence for evidence of illegal narcotics activity. During the approximately 1 ½-hour search, police located a cylindrical container in the basement of the residence containing a large bag of cocaine and five smaller bags of cocaine weighing a total of 15.727 grams. In a bedroom not far from where officers located the cocaine, mail addressed to Malone and a prescription pill bottle belonging to Malone was found along with Malone's social security card. Also, four vehicles belonging to Malone were located at the residence.

A Jefferson County Grand Jury indicted Malone, charging him with one count of trafficking in a controlled substance (cocaine), over four grams. Prior to trial, Malone, arguing a lack of probable cause, filed a motion to suppress, asking the court to exclude the evidence seized pursuant to the search warrant. The circuit court denied the motion, finding that the four corners of the motion contained sufficient information to support its issuance. A three-day trial ensued.

At trial, Malone testified that he did not live at the residence on South Third Street, but lived at 1829 Gaulbert Street in Louisville with his mother and had done so for nineteen or twenty years. He stated that Gisella Coleman is his child's mother and she lives at the residence with the child, but stated that he could not live with her due to her mental problems. Malone introduced an insurance document with his fraternal twin brother Darryl's name on it, showing that Darryl had listed 4930 South Third Street as his address. He testified that on the day of the search, Darryl did not answer his phone, so he went to the residence looking for him. He waited there because he did not want Darryl, a registered sex offender, to be there alone with his daughter.

At the close of evidence, the jury found Malone guilty and recommended a sentence of five years' imprisonment. The trial court imposed the five-year sentence and placed Malone on probation. Malone appeals as a matter of right, arguing that the trial court erred when it failed to grant his motion to suppress and failed to grant his motion for a directed verdict. We disagree, and for the reasons set forth below, affirm the circuit court's rulings.

Further facts will be developed as necessary.

ANALYSIS

I. Motion to Suppress

The Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution prohibit the issuance of a search warrant except

upon probable cause supported by oath or affirmation describing as nearly as may be the place to be searched or the person or thing to be seized. “When requested to issue search warrants, judges may not simply act as rubber stamps for the police and merely ratify the bare conclusions of others, nor may they consider information outside the affidavit.” *Hensley v. Commonwealth*, 248 S.W.3d 572, 576 (Ky. App. 2007).

On June 22, 2011, Officer Doyle submitted an affidavit for a search warrant for the residence located at 4939 South Third Street, Louisville, Kentucky, a blue/gray Chevy and a red Ford Mustang, and the person of Darnell Malone, which provided in part:

Affiant received information from Confidential Informant (CI) who pursuant to the Kentucky Rules of Evidence 508 is knowledgeable of the ways drugs are packaged and sold due to his/her involvement in the illicit world of drug trafficking. This informant is versed in the ways drugs are packaged, possessed, sold, and distributed. This informant stated that a B/M by the name of “Darnell” is selling drugs from a house on the corner of Third Street and Amherst. CI further stated that the house sits across from the Speedway and there is an unknown vehicle covered by a gray cover sitting near the garage. CI stated that “Darnell” has a blue/gray Chevy and a red mustang that CI has seen drugs in before. CI also stated that “Darnell” has a twin brother named “Darryl” who also sells drugs and was recently released from incarceration. After receiving this information, affiant was able to get possible last name of “Malone” as well as a photo and verify that the subject of this warrant is “Darnell Malone”.

Malone argues that the information in the affidavit regarding the confidential informant was “a bare-bones conclusion of the detective and says

nothing about the informant's veracity and his basis of knowledge about Appellant." Additionally he argues that "there was no information stating that the informant was reliable, or that the informant had ever provided any previous information to the officer that had proved to be correct." Based on the paucity of information regarding the confidential informant, Malone does not believe that issuance of the search warrant was supported by probable cause.

On appellate review of a trial court's denial of a motion to suppress, we engage in a two-step analysis. First, we review the factual findings of the trial court under the clearly erroneous standard to see if they are supported by substantial evidence. Kentucky Rules of Criminal Procedure 9.78; *Smith v. Commonwealth*, 410 S.W.3d 160, 164 (Ky. 2013). Next, we review the motion de novo to determine if the trial court's decision was correct as a matter of law. *Id.*

With respect to the first step, the trial judge did not make specific findings of fact; however, it denied Doyle's motion to suppress based on the four corners of the motion. Implicitly, this means that the trial judge found that the affiant's assertions in the affidavit were true. Malone does not contest the facts set forth in the affidavit and Detective Doyle swore its truth; therefore, we find that the affidavit's contents are supported by substantial evidence. We will thus apply the law to the facts set out in the affidavit to determine whether the trial court's decision to deny Malone's motion was correct.

Prior to the United States Supreme Court's decision in *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed 527 (1983), a two-

pronged test was used to determine whether an affidavit that relies on the information provided by an anonymous or confidential informant sufficiently established probable cause to issue a warrant. The first prong required that the affiant disclose the means by which the informant acquired the information, also known as “basis of knowledge.” The second prong required that the affiant establish that the informant was truthful or reliable. *Id.* at 233, 2329. In *Gates*, the Supreme Court abandoned the two-pronged test set forth in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and established a totality of the circumstances test for determining whether a warrant-issuing judge had a substantial basis for concluding that probable cause existed to issue the warrant.

Pursuant to *Gates*, a trial court should “make a practical, common-sense decision whether, given all 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.” *Gates*, 462 U.S. at 238, 103 S.Ct. 2317. The court should continue to consider an anonymous or confidential informant’s “veracity” and “basis of knowledge,” just not as “two largely independent channels.” *Id.* at 233, 2329. “[T]hey are better understood as relevant considerations in the totality-of-the-circumstances analysis that has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” *Id.* Examples of strong showings of reliability include: unquestionably honest

citizens who come forth with information that if fabricated might subject them to criminal liability; highly explicit and detailed information along with a statement that the event was observed first-hand; and corroboration of details of an informant's tip by independent police work. *Id.* at 233-242, 2329-2334; *Lovett v. Commonwealth*, 103 S.W.3d 72, 78-79 (Ky. 2003). As a reviewing court we are to afford the warrant-issuing judge great deference. Our duty is to ensure that the judge "had a substantial basis for concluding that probable cause existed." *Gates*, 462 U.S. at 238-239, 103 S.Ct. at 2332.

Here, we are convinced that the warrant-issuing judge had a substantial basis to conclude that probable cause existed. The confidential informant in this case was shown to be reliable because his tip was corroborated by independent police work by Detective Doyle. The affidavit specifically states:

Acting on the information received, affiant conducted the following independent investigation:

- Affiant conducted surveillance at the location and observed an unknown vehicle parked near the garage of location with a gray cover over it.
- Affiant also observed a blue/gray Chevy parked at the location bearing KY tag 209KEC. This vehicle is registered to Malone and affiant was able to look up a recent traffic citation issued to Darnell Malone on 5-12-11 and he was driving this vehicle.
- Within the last 48 hours of this warrant being signed, affiant conducted a controlled buy from 4930 South Third Street. A B/M matching the description of Malone was observed exiting the side door of the location and sell (sic) the CI a

quantity of narcotics. B/M subject then went back inside the location.

Under the totality-of-the-circumstances test, the fact that within forty-eight hours of seeking a search warrant, Detective Doyle conducted and observed a controlled buy from someone who came in and out of the residence, was enough for the trial judge to conclude that the confidential informant was reliable and that there was probable cause to search the residence. The informant told police that a person matching Malone's description sold drugs out of the residence and that turned out to be true. *See Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998) (concluding that findings of trial court with respect to its denial of a motion to suppress were supported by substantial evidence when "the very specific information from the informer which was confirmed in every detail by independent police observation, reasonably led the police to believe that the tip was sufficiently truthful and reliable to justify" a vehicle stop). Any deficiency in the affidavit regarding the informant's basis of knowledge was compensated for by a strong showing that the confidential informant was reliable.

Malone argues that the independent investigation by Detective Doyle cannot save the affidavit because the description of Malone being a black male, approximately six feet tall, and weighing approximately one-hundred eighty pounds was "not sufficient to distinguish Malone from his twin brother, or from hundreds, if not thousands, of similarly built black males." However, as noted above, the confidential informant was proven reliable by the affiant's independent

investigation. The informant gave Malone's name and distinguished him from his fraternal twin brother. Based on the totality of the circumstances, the affidavit was sufficient to establish probable cause to search both the residence and Malone's person. In any event, no contraband was found on Malone's person.

Malone believes that he should have been afforded a hearing on his motion to suppress so that he could show the lack of accuracy in the affidavit. However, in order to warrant an evidentiary hearing, Malone's "attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." *Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1998). There is a presumption of validity to an affidavit and before a hearing is mandated, there must be allegations of deliberate falsehoods or reckless disregard for the truth and those allegations must be accompanied by an offer of proof. *Id.* at 171, 98 S.Ct. at 2684. Malone made no such allegations or offer of proof and therefore was not entitled to an evidentiary hearing.

II. Directed Verdict

Malone's other argument is that the trial court should have directed a verdict because the evidence was insufficient to support his conviction. This issue was preserved by Malone's motion for a directed verdict at the close of the Commonwealth's case and his renewed motion for a directed verdict at the close of all evidence.

The standard of review for directed verdicts is set forth in *Commonwealth v. Benham*, 816 S.W.2d 186, 187-188 (Ky. 1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal[.]

Malone argues that a reasonable jury could not conclude that the cocaine belonged to him. He insists that there was no evidence that he was aware of the cocaine and that mere presence at the house is not sufficient to attach guilt. We disagree.

Our Supreme Court held in *Houston v. Commonwealth*, 975 S.W.2d 925, 927 (Ky. 1998), that “possession” for the purposes of Kentucky Revised Statutes (KRS) Chapter 218A includes constructive possession. “To prove constructive possession the Court must present evidence that the contraband was subject to the defendant’s dominion and control.” *Pate v. Commonwealth*, 134 S.W.3d 593, 598 (Ky. 2004). Possession does not have to be exclusive. “Two or more persons may be in possession of the same drug at the same time and this possession does not necessarily have to be physical possession.” *Franklin v. Commonwealth*, 490 S.W.2d 148 (Ky. 1972).

The Commonwealth presented evidence showing that when police arrived to execute the search warrant, Malone was alone in the residence and had a key to the residence. Inside the residence police found Malone's social security card, a credit card belonging to Malone, and a prescription bottle issued to Malone. Mail addressed to Malone was found upstairs and four vehicles registered to Malone were found outside the residence and in the garage. We believe that the Commonwealth presented sufficient evidence that a jury could find beyond a reasonable doubt that Malone had dominion and control over the residence. *See Dawson v. Commonwealth*, 756 S.W.935 (Ky. 1998) (presence in an apartment of bills addressed to the defendant, an identification card containing his photograph, and evidence that utilities were registered in his name, sufficed to prove that the defendant constructively possessed substances also found in the apartment).

While “[a] defendant's exclusive control over the premises is sufficient to raise an inference of possession and knowledge[,]... joint control of the premises requires further evidence to prove the defendant knew the substance was present and had it under his control.” *Hayes v. Commonwealth*, 175 S.W.3d 574, 594 (Ky. 2005) (quoting *State v. Villaneuva*, 147 S.W.3d 126, 130 (Mo. Ct. App. 2004)). Malone argues that the Commonwealth offered no evidence whatsoever to show that any particular person possessed the “well-hidden drugs.” We disagree.

The evidence presented at trial showed that when Malone was alerted to police presence he ran from the residence and threw the key to the house in the

front yard. It is widely accepted that “[f]light and attempt at concealment are circumstantial evidence of guilt because they suggest a guilty state of mind.” *Welborn v. Commonwealth*, 157 S.W.3d 608, 615 (Ky. 2005) (citing *Fugate v. Commonwealth*, 445 S.W.2d 675 (Ky. 1979)). Malone’s act of running away from the premises and attempt to conceal the key to the residence coupled with his dominion and control over the premises was sufficient to create a jury question as to whether Malone knew that the cocaine was present and had it under his control. It was not clearly unreasonable under the evidence as a whole for the jury to find guilt. Therefore, the trial court was correct when it denied Malone’s motion for a directed verdict.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky