

RENDERED: AUGUST 11, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001288-MR

WENDELL WILLIAMS YATES, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 13-CR-01258-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: J. LAMBERT, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Wendell Williams Yates, Jr. appeals from a judgment of conviction by Fayette Circuit Court following a conditional guilty plea after the trial court denied his motion to suppress. For the reasons set forth, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 21, 2013, a Fayette County grand jury returned an indictment charging Yates with two counts of trafficking in a controlled substance, first and third degree, respectively, and one count each of possession of a controlled substance (opiates), and possession of drug paraphernalia. During the course of the proceedings, Yates filed a motion to suppress evidence found during a search of his apartment. He argued that the affidavit supporting the warrant was based on unreliable and stale information, and consequently did not establish probable cause for the issuance of the warrant.

Thereafter, the trial court conducted an evidentiary hearing on the motion to suppress. Detective John McBride of the Lexington-Fayette Urban County Division of Police testified regarding his investigation leading up to the warrant. Detective McBride testified that, on August 6, 2012, he received information from a confidential informant that Yates was selling prescription pain medication. According to the informant, Yates would “usually meet people out or [would] get a hotel room and deal from [there].” Based on the information, Detective McBride arranged a controlled drug buy on August 8, 2012. The informant purchased eleven Oxycontin pills from Yates and returned them to the detective. Following the buy, however, the informant became unavailable and the investigation was put on hold.

On January 10, 2013, a second confidential informant provided information that Yates, who was commonly known as “Juice,” was selling heroin,

prescription pain medication, and cocaine. Lexington Police officers subsequently performed three “trash pulls” outside of Yates’s residence on 691 Harr Circle in Lexington. After the first trash pull on February 7, 2013, Detective McBride found various items of drug paraphernalia, including a cut “snort tube,” a used straight razor, and mail with Yates’s name and address, as well as paperwork for a handgun. As a result of the second trash pull on March 13, 2013, the police found more mail belonging to Yates and drug paraphernalia, which included cut straws with a white powder residue and an empty prescription pill bottle for oxycodone.

Shortly after the second trash pull, on March 18, 2013, a third confidential informant told the police that Yates was selling heroin and prescription pain medication. The informant also provided pictures of Yates holding a large amount of cash and a handgun. After receiving this information, Detective McBride located a picture on social media of Yates holding a large amount of cash titled “THE ONE AND ONLY JUI\$E.” On April 10, 2013, Lexington Police officers performed a third trash pull finding mail addressed to Yates and items of drug paraphernalia, including several cut straws and a bent spoon with burn marks on the underside.

On April 11, 2013, Detective McBride submitted an affidavit for a search warrant of Yates’s residence that set forth the above-information. A Fayette District Court judge issued a warrant that Lexington Police executed later that day. Upon execution, the officers seized 72 oxycodone pills, 4 alprazolam pills, various

items of drug paraphernalia including, scales, a pill cutter, and a grinder. They also seized \$16,481 in cash.

After the hearing, the circuit court denied the motion to suppress. Yates subsequently entered a conditional guilty plea pursuant to a plea agreement, preserving his right to appeal the circuit court's judgment regarding the motion to suppress. On August 3, 2016, the circuit court entered a final judgment sentencing him to ten-years' imprisonment on the count of first-degree trafficking in a controlled substance, second or greater offense, and dismissing the other counts. This appeal followed.

STANDARD OF REVIEW

When reviewing a suppression hearing ruling regarding a search pursuant to a warrant, appellate courts must first determine if the facts found by the trial court are supported by substantial evidence, and then determine whether the trial court correctly held that the issuing judge did or did not have a substantial basis for concluding that probable cause existed. *Minks v. Commonwealth*, 427 S.W.3d 802, 809-10 (Ky. 2014), citing *Commonwealth v. Pride*, 302 S.W.3d 43, 48 (Ky. 2010); RCr¹ 8.27. An appellate court “must give great deference to the warrant-issuing judge’s decision” and should “review the four corners of the affidavit and not extrinsic evidence in analyzing the warrant-issuing judge’s

¹ Kentucky Rules of Criminal Procedure.

conclusion.” *Pride*, 302 S.W.3d at 49, citing *Commonwealth v. Hubble*, 730 S.W.2d 532 (Ky. App. 1987).

ANALYSIS

Yates argues that the affidavit and information in the search warrant did not create probable cause for the search because it was stale and conclusory in nature and did not set forth sufficient particular facts that linked him to the information. In *Pride*, the Supreme Court reaffirmed the “totality of the circumstances” test as set forth in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), for finding probable cause in issuing search warrants. *See also Beemer v. Commonwealth*, 665 S.W.2d 912 (Ky. 1984). “Under the *Gates* test, the warrant-issuing judge is not required to attest to the validity of the information provided in the warrant, but rather ‘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.’” *Minks*, 27 S.W.3d at 808, quoting *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332. A warrant-issuing judge’s determination of probable cause should be paid great deference by reviewing courts. *Pride*, 302 S.W.3d at 48 (citations omitted); *Goncalves v. Commonwealth*, 404 S.W.3d 180, 191 (Ky. 2013).

In assessing whether an affidavit established probable cause to support the issuance of a warrant, a reviewing court must consider only the four corners of the affidavit and not extrinsic evidence in analyzing the warrant-issuing

judge's conclusion. *Pride*, 302 S.W.3d at 49. Conclusory allegations in an affidavit are insufficient to establish probable cause. *Hensley v. Commonwealth*, 248 S.W.3d 572, 576 (Ky. App. 2008).

However, a search-warrant affidavit is not rendered invalid simply because it does not include the time and date of any observations on which it relies, provided the totality of the circumstances indicates with reasonable reliability that the evidence sought is located in the place to be searched. *Abney v. Commonwealth*, 483 S.W.3d 364, 369 (Ky. 2016). To the extent that the affidavit relies upon hearsay information provided by a confidential informant, the affidavit must set forth facts establishing reasonable reliance on the informant. *See Blane v. Commonwealth*, 364 S.W.3d 140, 147 (Ky. 2012), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015). Furthermore, probable cause cannot be premised on “stale” information, unless corroborated by recent information showing that the evidence remains in the location to be searched. *Ragland v. Commonwealth*, 191 S.W.3d 569, 584 (Ky. 2006).

Yates first argues that the affidavit failed to establish the basis for relying upon statements by the confidential informants. We disagree. The reliability of the first confidential informant was proven by the completion of a controlled drug purchase from Yates shortly after the information was received. Likewise, Detective McBride independently confirmed the information provided by the second informant through the trash pulls and independent investigation. In

addition, the information in the affidavit was not conclusory. Rather, the affidavit thoroughly described the information received from the confidential informants, the evidence obtained from the confidential informants, and the investigation conducted by the police.

Second, Yates argues that the information provided by the first informant was stale and could not serve as a basis for finding probable cause. However, where the affidavit properly recites facts indicating a course of conduct and activity of a protracted and continuous nature, the passage of time becomes less significant. *Id.* Here, Detective McBride stated that Yates was engaged in an ongoing trafficking operation, which was corroborated by later information and the trash pulls. Therefore, we agree with the Commonwealth that the information supporting the issuance of the affidavit was not stale.

Third, Yates maintains the fact that the white residue referenced in the affidavit was not scientifically tested rendered that information unreliable. In his affidavit, Detective McBride stated that the items in the trash pulls included empty plastic baggies and cut straws with a white powder residue. Detective McBride added the empty baggies were indicative of trafficking narcotics. We agree with the trial court that probable cause does not require scientific testing of every substance referred to in a search warrant. In light of the other information provided in the affidavit, the issuing court had sufficient evidence to find probable cause establishing drug trafficking activity by Yates.

And finally, Yates argues that the information from the confidential informants was insufficient to establish probable cause for the warrant because it lacked a nexus for a search of his residence. Yates asserts that the information from the confidential informants merely suggested that he had sold drugs at unspecified locations other than his residence. But as noted above, the evidence regarding Yates's trafficking activity led the police to conduct the three trash pulls at his residence. Based on the totality of the circumstances, the information provided in the affidavit permitted a reasonable inference that evidence of Yates's drug trafficking might be found at his home. *See Beckam v. Commonwealth*, 284 S.W.3d 547, 550 (Ky. App. 2009). Consequently, the trial court properly denied Yates's motion to suppress.

Accordingly, we affirm the judgment of conviction by the Fayette Circuit Court.

ALL CONCUR.

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