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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001525-MR

THOMAS METCALF — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 16-CR-00393

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON[1] AND KRAMER, JUDGES.

CLAYTON, CHIEF JUDGE: Thomas Amuel Metcalf appeals from a judgment of the Nelson Circuit Court following his entry of a conditional guilty plea to charges of cultivating marijuana and possession of drug paraphernalia. Metcalf's plea is conditioned on his right to appeal the circuit court's denial of his motion to

[1] Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

suppress evidence found in his residence by the police. Metcalf argues that the affidavit supporting the search warrant was insufficient to establish probable cause for the search. We disagree and affirm the decision of the circuit court.

On November 3, 2016, Bardstown Police Detective James E. Williamson sought a warrant to search Metcalf's residence and surrounding property on Loretto Road in Bardstown. The affidavit presented by Williamson contained the following information: On October 19, 2016, Williamson received a complaint that Metcalfe was cultivating marijuana at his residence and selling "pounds of marijuana." The complainant also stated that Metcalf's girlfriend was named Stacy Clan.

On October 31, 2016, Williamson received information from an unidentified confidential informant that Metcalf was cultivating marijuana inside his residence and was about to make a large amount of money from his "indoor marijuana grow." The confidential informant stated that he or she had received marijuana from Metcalf's operation from Stacy Clan.

The police had previously received a tip in April 2015 that Metcalf was cultivating and selling marijuana.

Detective Williamson identified Metcalf's residence, observed him at the residence and confirmed that the Loretto Road address matched the one on Metcalf's driver's license.

On November 3, 2016, while conducting surveillance of Metcalf's house, Detective Williamson and Detective Mike Watts observed a pickup truck leaving the residence after a visit lasting about ten minutes. The detectives conducted a traffic stop of the vehicle. They ascertained the truck belongs to James B. Wheatley, the driver, who was convicted of cultivating marijuana in 2013. Wheatley confirmed that he had just left Metcalf's house. Another police officer deployed a K9 who alerted to the presence of drugs on the driver's side of the truck. A search of the vehicle did not yield any contraband, but the officers found half a Lortab pill on Wheatley's person.

Williamson and Watts proceeded to the Metcalf residence to conduct a "knock and talk." When they arrived, they were met by Metcalf who appeared to be very nervous and placed his body between the officers and the door of his house. The officers observed a grow light leaning against the residence. According to Williamson, in his experience as a narcotics detective, such lights are commonly used in indoor marijuana grow operations. Metcalf told the officers that he did smoke marijuana and was arrested early in his life for possessing a marijuana joint but refused their request to search the residence. He confirmed that Stacy Clan was his "on and off" girlfriend.

While Detective Watts was speaking with Metcalf, Williamson walked next door to speak with the neighbors, Metcalf's brother, Perry, and his

wife, Mary. He described them as "very nervous." Mary told Williamson she believed Metcalf was involved in criminal activity.

Based on the foregoing information in the affidavit, the police obtained a warrant to search Metcalf's house. The search yielded an indoor marijuana grow operation, approximately 250 marijuana plants and a small amount of cocaine and methamphetamine. Metcalf was indicted on charges of cultivating marijuana (five plants or more), two counts of possessing a firearm while committing an offense, trafficking in marijuana, possession of a controlled substance (cocaine), possession of a controlled substance (methamphetamine) and possession of drug paraphernalia. He filed a motion to suppress the items seized during the search of his home, arguing that the affidavit supporting the search warrant failed to establish probable cause. Following a hearing, the trial court denied the motion. In its order, the trial court listed multiple grounds for finding the affidavit sufficient, including the anonymous complaint, the tip from the confidential informant, the K9 alert on Wheatley's truck, the presence of the grow light, and Metcalf's sister-in-law's opinion that he was involved in criminal activity. Metcalf entered a conditional plea of guilty to amended charges of cultivating marijuana five plants or more and possession of drug paraphernalia and received a total sentence of four years. This appeal followed.

In order 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).

Kentucky has adopted the federal "totality of the circumstances" test for determining whether probable cause existed at the time a warrant was issued. *Beemer v. Commonwealth*, 665 S.W.2d 912, 914 (Ky. 1984) (citing *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)). This standard describes the task of the issuing magistrate as "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and the 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*

Thus, "the trial court judge faced with a motion to suppress evidence obtained pursuant to a search warrant should . . . 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 (Ky. 2010).

In reviewing a suppression ruling, the appellate court must "determine first if the facts found by the trial judge are supported by substantial evidence, [Kentucky Rules of Criminal Procedure] RCr 9.78, and then to determine whether the trial judge correctly determined that the issuing judge did or did not have a substantial basis for . . . conclud[ing] that probable cause existed." *Commonwealth v. Pride*, 302 S.W.3d 43, 49 (Ky. 2010) (internal citations and quotation marks omitted). The reviewing court "must give great deference to the warrant-issuing judge's decision." *Id*. (citing *Gates*, 462 U.S. at 236, 103 S.Ct. 2317).

Metcalf argues that the information in the affidavit was unsubstantiated, unreliable and stale, focusing on three areas in particular: (1) the nature of the tips received by the police; (2) the police encounter with James Wheatley; and (3) the visit of the police to Metcalf's residence.

He contends that the first tip, the complaint of October 19, 2016, was insufficient to establish probable cause because it came from an anonymous source. Metcalf relies on *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) and *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), which stand for the proposition that an anonymous tip alone seldom demonstrates the informant's basis of knowledge and truthfulness, and therefore

can rarely form the sole basis for reasonable suspicion, let alone probable cause. In *J.L.*, an investigatory *Terry* stop was held impermissible when the police officers' suspicion that the suspect was carrying a weapon "arose not from any observations of their own but **solely** from a call made from an unknown location by an unknown caller." 529 U.S. at 270, 120 S.Ct. at 1378 (emphasis supplied). In *Alabama*, an unverified but corroborated tip was deemed sufficient to create reasonable suspicion for a *Terry* stop but not probable cause, because "an anonymous tip **alone** seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is . . . largely unknown, and unknowable." 496 U.S. at 329, 110 S. Ct. at 2415 (internal citations omitted) (emphasis supplied). But the anonymous complaint lodged in Metcalf's case did not form the sole basis for seeking the warrant and formed only one part of the totality of the information contained in the affidavit.

The fact the second tip came from a confidential informant who, it was revealed at the suppression hearing, was new, inexperienced and had not participated in any controlled buys, does not mean the tip was worthless. The informant was known to the police and his or her tip closely corroborated the allegations made in the earlier anonymous complaint. The same reasoning can be

applied to the 2015 tip that Metcalf was cultivating and selling marijuana. Metcalfe argues that the information was stale. "[W]hether information contained in an affidavit is stale must be determined by the circumstances of each case." *Ragland v. Commonwealth*, 191 S.W.3d 569, 584 (Ky. 2006) (internal citation and quotation marks omitted). "[E]ven if a significant period has elapsed since a defendant's last reported criminal activity, it is still possible that, depending upon the nature of the crime, a magistrate may properly infer that evidence of wrongdoing is still to be found on the premises." *Id*. As with the other tips, the 2015 tip was not the sole basis for seeking the warrant and certainly has some corroborative value which the magistrate was entitled to consider.

Metcalf also argues that what he characterizes as the lack of formal documentation of tips and complaints by the police weakened their reliability. He does not, however, explain with any specificity how this alleged lack of reliability manifested itself in this case.

Next, Metcalf argues that James Wheatley's visit did not create suspicion that Metcalf was growing or selling marijuana from his home, because the purpose of Wheatley's visit could have been entirely innocent. But Wheatley's visit to the home did take on new significance after the drug canine alerted on his truck. As with the individual tips, Wheatley's visit, standing on its own, would

most likely not support a finding of probable cause but that is not the factual situation before us.

Finally, Metcalf contends that the police visit to his house did not yield any facts that would support a suspicion of illicit activity. We disagree because, again, the presence of the grow light and Metcalf's nervous behavior must be assessed, not in isolation, but in light of the other information contained in the affidavit. The presence of the grow light coupled with the detective's explanation, based on his experience, that it was likely evidence of a marijuana growing operation, could certainly support an inference that there was contraband within the home. Similarly, although "nervous behavior *alone* is an insufficient basis for reasonable suspicion[,]" *Frazier v. Commonwealth*, 406 S.W.3d 448, 454 (Ky. 2013), it also need not be automatically disregarded.

In sum, although Metcalf highlights numerous pieces of evidence in the affidavit which, standing on their own, would not be sufficient to create probable cause, that is simply not the standard for assessing an affidavit. "The law is clear: 'the Fourth Amendment's requirement of probable cause for the issuance of a search warrant is to be applied, not according to a fixed and rigid formula, but rather in light of the "totality of the circumstances" made known to the magistrate.'" *Abney v. Commonwealth*, 483 S.W.3d 364, 369 (Ky. 2016) (quoting *Massachusetts v. Upton*, 466 U.S. 727, 728, 104 S.Ct. 2085, 80 L.Ed.2d 721

(1984)). "That is the only standard for reviewing the issuance of a search warrant." *Id*.

The information in the affidavit, considered in its totality, was sufficient for the magistrate to find probable cause. Consequently, the Nelson Circuit Court did not err in denying the motion to suppress and its final judgment is affirmed.

ALL CONCUR.

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