

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JANUARY 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2002-SC-0710-MR

DATE 2-12-04 EJA/Grouitt, D.C.

JOSEPH BERTRAND CAVE

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
2001-CR-0581 AND 2001-CR-1996

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Joseph Bertrand Cave, pled guilty to eight counts of burglary, five counts of first-degree rape, four counts of first-degree sodomy, three counts of first-degree sexual abuse, one count of attempted rape, and second-degree persistent felony offender. After enhancement for the PFO II count, Cave was sentenced to life on each of the first-degree burglary counts and three of the first-degree rape counts, twenty-four years' imprisonment on each of the two remaining first-degree rape counts, twenty years' imprisonment on each of the first-degree sodomy counts, ten years' imprisonment on each of the first-degree sexual abuse counts, and twenty years' imprisonment on the attempted rape count. According to the appellant's brief, Cave reserved the right to appeal the validity of the search warrant in this case when he entered his guilty plea.

While there is nothing in the judgment itself to indicate that Cave entered a conditional plea under RCr 8.09, we address the issue in an abundance of caution.

I. Facts and Procedural History

On November 8, 2000, Cave was arrested for forty-two burglaries committed in the Hikes Point area of Louisville between June and November 2000. At the time of Cave's arrest, there was an ongoing investigation into seven sex offenses committed between 1997 and 1999 that were linked by DNA evidence. These crimes were known as the "flashlight rapes," because the rapist used a flashlight to blind his victims.

Detective Chris Horn, who was the officer in charge of investigating the burglaries, suspected that Cave might be the flashlight rapist. His suspicion was based on the circumstances surrounding some of the burglaries for which Cave was arrested, and the fact that Cave had a small flashlight hidden in his pants when he was arrested. Detective Horn then contacted a Lieutenant Richardson and informed him of the possible connection between Cave and the flashlight rapes. Lieutenant Richardson, in turn, contacted Detective Higgs, who was in charge of the investigation into the flashlight rapes and relayed Detective Horn's suspicions.

Acting on this information, Detective Higgs prepared an affidavit for a search warrant, which resulted in the issuance of a search warrant to obtain a sample of Cave's blood. Cave's sole argument consists of an attack of the truthfulness of the statements contained in this affidavit.

In Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the U.S. Supreme Court held that a criminal defendant has the Constitutional right under the Fourth Amendment to challenge a facially valid search warrant under certain conditions:

[T]he challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.

Id. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682.

If the defendant meets these requirements, the next step for the trial court is to set aside the challenged portion of the affidavit and examine whether the redacted affidavit is sufficient to support a finding of probable cause for the search. Id. at 171-72, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682. If the redacted affidavit still supports probable cause, the search is valid and the trial court's inquiry ends. But if the redacted affidavit does not support probable cause, the defendant is entitled to a hearing on the question of whether the affiant deliberately lied or recklessly disregarded the truth when he or she swore to the affidavit in support of the search warrant. Id. at 172, 98 S. Ct. at 2685, 57 L. Ed. 2d at 682.

In the case at bar, Cave challenged numerous portions of the affidavit that formed the basis for finding probable cause to obtain a sample of his blood. The trial court found that Cave had met the Franks requirements and held a hearing on the veracity of the challenged statements contained in the affidavit. While not directly stated, the decision to hold the hearing implies that the trial court concluded that if all the challenged statements were redacted from the affidavit, there would not be enough of the affidavit left to support a finding of probable cause. Hence, a completely successful challenge would have resulted in suppression of the test results obtained

from the blood sample. See Franks, 438 U.S. at 164-71, 98 S. Ct. at 2680-84, 57 L. Ed. 2d at 678-82 (discussing the reasons for applying the exclusionary rule to this type of situation).

At the conclusion of the hearing, the trial court found that a number—but not all—of the challenged statements were either false or made with a reckless disregard for the truth. The trial court then turned to the redacted affidavit, which it concluded contained sufficient facts to support a finding of probable cause.

On appeal, Cave argues that the trial court erred in finding that some of the challenged statements were neither false nor made with a reckless disregard to the truth. Further, he argues the trial court erred in concluding that the redacted affidavit was sufficient to support a finding of probable cause. We disagree with both of these arguments.

II. Standard of Review

Ordinarily, "the standard of review for determining the sufficiency of the affidavit is whether the magistrate had a substantial basis for finding that the affidavit established probable cause to believe that the evidence would be found at the place cited." United States v. Rodriguez-Suazo, 346 F.3d 637, 643 (6th Cir. 2003) (internal quotation marks omitted). This review is not made de novo. Id. Rather, "the magistrate's probable cause determination should be afforded great deference." Id. This case does not fall under the ordinary review because of the redactions in the affidavit made by the trial court.

Here, the redacted affidavit is not the same affidavit that the magistrate relied on to find probable cause. There are a number of omissions in the redacted affidavit. Thus, the totality of circumstances used by the magistrate to determine probable cause

are different from those reviewed by the trial court in this case. See Rodriguez-Suazo 346 F.3d at 644. Therefore, we conclude that a different standard of review is appropriate.

As for the trial court's findings concerning the truthfulness of the challenged statements, these are conclusive if they are supported by substantial evidence. Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998). As for the trial court's conclusion that the redacted affidavit established probable cause to issue the search warrant, such conclusion is reviewed de novo. Accord United States v. Crosby, 106 F.Supp.2d 53, 55 n.3 (D. Me. 2000). We now apply these standards of review to Cave's arguments.

III. Issues

Cave challenges both the findings made by the trial court after the Franks hearing, i.e., he argues that trial court erred in finding that some statements were neither knowingly false nor made with reckless disregard to the truth, and the trial court's conclusion that the redacted affidavit established probable cause for the search. We address these arguments in turn.

A. Findings

i. Residence

The affidavit states in pertinent part:

The first 3 rapes committed by this rapist occurred in the Portland area . . . [C]ave lives . . . in this area.

The 4th and 5th rapes moved to the Germantown area.

In the 6th rape, the rapist returned to the Portland area . . . , which is the area where Cave lives.

In the 7th case[,] the rapist returned to the east end

Cave lives in the Portland area and is charged with 42 burglaries in the east end, away from his home address. The last 3 out of 4 rape cases have moved from the Portland area and have been committed in the east end.

Cave argues that the repeated claim that he lived in the Portland area was either a deliberate lie or was made with reckless disregard to the truth. This argument is based on Detective Higgs's admission that he did not know where Cave lived during the period in which the flashlight rapes occurred (1997-1999). Rather, Detective Higgs simply relied on Cave's known current address and had no knowledge of how long Cave had lived at this particular address or in the Portland area in general. Cave claims that this makes the statements regarding his residence at the time of the rapes "patently misleading." Standing alone, it is Cave's claim that is misleading.

Cave does not claim or even suggest that the statement concerning his residence at the time of the rapes is not true. Rather, he argues that the trial court should have redacted the statement because Detective Higgs lacked a sufficient factual basis to make it. Nothing in Franks indicates that a true statement made with reckless disregard to its truthfulness should be suppressed. Rather, Franks strongly implies that to reach the hearing stage, the defendant is required to show that the challenged statements in the affidavit are both false and made by the affiant with knowledge of their falsity or with reckless disregard to their truth. Franks, 438 U.S. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682. Therefore, we hold that, without any showing that the challenged statement is false, there are no grounds under Franks for redacting the statement from the affidavit.

ii. **Victim's Description**

The affidavit states in pertinent part:

The description of the rapist in the 4th rape case is W/M, 26 to 30 years old, thin build, dark short wavy hair, 160 -180 lbs., 5'9"-5'10" tall.

The description in the 5th rape case is W/M, 20's, curly brown hair.

The description in the 7th attempt[ed] rape case is W/M, 20-25 years old, 5'10"-5'11" tall, thin to medium build, dark short hair with a small mustache.

The description of . . . Cave is W/M, short dark curly hair, 31 years old, 5'9", 140 lbs, thin build.

Cave's description is similar to the description of the rapist.

Cave argues that this last statement was made with reckless disregard to the truth, and, therefore, the trial court erred by not striking it from the affidavit. This argument is based on the fact that the description of the attacker given by other rape victims not mentioned in the affidavit materially differs from the descriptions outlined above, e.g., one of the victims described the rapist as a black male and another described him as being 5'1" to 5'5" tall. The argument is also based on Detective Higgs's admission that he had neither personally seen Cave nor looked at a current mug shot of him. Rather, Detective Higgs based his description of Cave on information given to him by another officer. These arguments are not well taken.

The affidavit in support of a search warrant is not an adjudication of guilt or innocence. There is no requirement that, in establishing probable cause, the officer filling out the warrant must provide the reviewing magistrate with exculpatory material. Rather, the officer is obligated to establish probable cause for the search and may choose which facts support that finding, subject to the restrictions that he or she may not fabricate those facts or recite them with reckless disregard as to their truth. Detective Higgs was not obligated to include all of the descriptions of the rapist in the affidavit. Nor was Detective Higgs obligated to personally view Cave before including his description of Cave in the affidavit.

Detective Higgs relied on another officer's description of Cave. Cave has made no argument that the description given of him in the affidavit is not truthful, except that it fails to mention that he wore his hair in a rattail. Moreover, the trial court found that Detective Higgs's description of Cave in the affidavit was fairly accurate. Thus, this finding is clearly supported by substantial evidence. There was no error.

iii. Crime Statistics

The affidavit states in pertinent part:

Investigator found that on 7/6/92, Cave was convicted of burglary in Florida.

Investigator has read that National Crime Statistics and Crime Statistics from Florida indicated that about 52% of people found guilty of burglary will eventually be found guilty of a murder or sexual assault.

The trial court found that the statement regarding crime statistics was not knowingly false because Detective Higgs produced the article that made this claim and his recitation of the statistics from the article was truthful. This finding is based on substantial evidence. There was no error.

B. Conclusions

After redacting the statements in the affidavit that it found were both false and made with knowledge of their falsity or with reckless disregard to their truthfulness, the trial court concluded that what remained of the affidavit was sufficient to support a finding of probable cause. As recited by the trial court in its order, these were:

- [S]ome of the rapes occurred in the Portland area and Mr. Cave lived in the Portland area. Even if the only time Higgs could have positively known he lived in Portland was shortly after the rapes ended this is sufficient to show that Cave lived in Portland around the time the rapes had been committed.
- [B]oth the burglaries and the rapes occurred when the suspect entered through doors, screens and windows.

- [A]lthough there were discrepancies regarding the rapists physical features the Magistrate had DNA evidence linking the attacker in six of the seven attacks to the same person. The Magistrate also has truthful statements by Higgs stating that the rapist was wearing a mask or [was] otherwise impossible to see. Also not a single description of the rapist described him as female, heavy set or with light hair. Cave is male with a medium build and dark/black hair.
- [W]hen the police arrested Cave for the burglaries he was found to be in possession of a flashlight similar to a flashlight used by the rapist which a year prior had been found by police.

The above facts support the trial court's conclusion that the redacted affidavit contained sufficient facts to establish probable cause for issuing the search warrant for a sample of Cave's blood. "Probable cause to search is described as a 'fair probability' that evidence of the crime will be found at the location to be searched." Rodriguez-Suazo, 346 F.3d at 644.

Cave was a convicted burglar and was under arrest for committing forty-two burglaries. His method of entry in the charged burglaries was similar to the method of entry used by the flashlight rapist. Cave's physical description matched, or was close to, the physical descriptions of the rapist given by some of the victims of the flashlight rapist. Finally, when Cave was arrested, he was found in possession of a flashlight similar to one recovered at the crime scene from the attempted rape. All of the rapes and the attempted rape were connected by DNA evidence. These facts establish a "fair probability" that the "search" of Cave's blood would reveal DNA evidence linking him to the flashlight rapes.

For the reasons set forth above, we affirm the judgment of the Jefferson Circuit Court.

Lambert, C.J.; Cooper, Graves, Johnstone, Stumbo, and Wintersheimer, JJ., concur.
Keller, J., concurs in result only.

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