

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

CONFIDENTIAL

2006-SC-000686-TG

DATE 11-26-07 EJA/Grow/H.D.C.

DAVID NICHOLS

APPELLANT

V.

ON APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
NO. 05-CR-000077

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, David Nichols, appeals the denial of his motion to suppress evidence seized in a police search. Appellant argues the search was illegal because there was no probable cause to issue a search warrant. After the search uncovered incriminating evidence, he pled guilty to possession of a handgun by a convicted felon and possession of a firearm by a convicted felon. For these crimes Appellant was sentenced to fifteen (15) years imprisonment. Appellant, however, specifically reserved his right to appeal the denial of his motion to suppress evidence.

Appellant subsequently appealed the denial of the motion to the Court of Appeals who recommended transfer to this Court. We agreed to hear the matter

in connection with a related matter from Appellant. For the reasons set forth herein, we affirm the ruling of the Grayson Circuit Court.

On or about April 30, 2005, Grayson County Deputy Sheriff Matt Darst smelled an odor resembling ether while driving near Appellant's property. Suspecting a methamphetamine lab was present on Appellant's property due to the ether smell, Deputy Darst filed an affidavit to obtain a search warrant. The affidavit stated:

That on the 30th day of April 2005, Deputy Matt Darst During [sic] routine patrol detected a strong odor of ether in the area of the David Nichols residence. The Grayson County Sheriff's Office have [sic] an ongoing investigation on David Nichols manufacturing methamphetamine. The Sheriff's Department have [sic] received numerous tips that Nichols is manufacturing at this residence. The Sheriff's Department has been investigating Nichols for several months on information that Nichols along with Michael Wolford have been manufacturing methamphetamine.

Based on the affidavit, Grayson District Judge Shan Embry issued a search warrant for Appellant's property. During the search, the sheriff's department found numerous items potentially related to the manufacture of methamphetamine and multiple firearms.

Prior to trial, Appellant filed a motion to suppress the evidence found during the search because he believed there was no probable cause for the issuance of a search warrant. Deputy Darst testified at the suppression hearing that when he smelled the ether he was traveling at about 45 miles per hour with the windows of his car at least partially rolled down. Deputy Darst also stated that the smell of ether inside of Appellant's trailer when the warrant was executed was so strong that he had to leave the trailer for fresh air several times.

Detective Terry Blanton of the Grayson County Sheriff's Department testified that

while he did not smell ether from the road like Deputy Darst, as he approached the trailer he could smell it. Mary Malone, a lab technician with the Kentucky State Police, did not perform any tests to confirm the presence of ether but testified that, upon opening several jars, she smelled what she believed to be ether. Malone also indicated that the weather conditions at the time Darst detected the ether smell were conducive to the substance lingering in the air. Based upon the evidence presented during the suppression hearing, the trial judge denied the motion.

Appellant's sole issue on appeal is that the trial judge erred by denying his motion to suppress the evidence seized because Deputy Darst did not have probable cause to ask for a search warrant. Appellant further alleges that Deputy Darst displayed a reckless disregard for the truth in his affidavit because no investigation was conducted to determine the source of the ether before Darst obtained the search warrant.

"Our review of a search warrant must give great deference to the warrant-issuing judge's findings of probable cause and should not be reversed unless arbitrarily exercised." Moore v. Commonwealth, 159 S.W.3d 325, 329 (Ky. 2005). In determining whether there is probable cause, the issuing judge must "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." Lovett v. Commonwealth, 103 S.W.3d 72, 77 (Ky. 2003) (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983)). When reviewing the trial court's findings of fact after a suppression hearing, the conclusion shall be conclusive if

“supported by substantial evidence.” RCr 9.78, Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998). If the findings are supported by substantial evidence, then the trial judge’s application of the applicable law to the facts is reviewed de novo. Id.; see Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002).

In this matter, there is no evidence that Judge Embry acted in an arbitrary or biased manner in issuing the warrant for Appellant’s property. The presence of the ether odor in the area of Appellant’s property plus the anonymous tips that Appellant was involved in methamphetamine manufacturing provided adequate grounds for Judge Embry to believe that there was a fair probability that evidence of a crime would be found on Appellant’s property. See Drake v. Commonwealth, 222 S.W.3d 254, 256 (Ky. App. 2007) (holding that the smell of ether alone or in conjunction with other facts can provide sufficient probable cause).

Further, the trial court’s findings after the suppression hearing are not clearly erroneous. There is adequate evidence to support the trial court’s conclusion that Deputy Darst could smell ether coming from Appellant’s property as he drove past – including the testimony that other officers smelled ether outside and that Appellant’s trailer smelled strongly of ether. Appellant alleges no facts that would show the trial court’s ruling to be clearly erroneous other than Appellant’s doubt that Deputy Darst could smell the ether. While Deputy Darst did not conduct an investigation into exactly where the ether smell was emanating from, the totality of the circumstances and his knowledge that several anonymous tips had been given regarding Appellant’s manufacture of methamphetamine gave him good reason to believe criminal acts were occurring

on Appellant's property. Therefore, Deputy Darst did not recklessly disregard the truth. Since Deputy Darst had probable cause to request a warrant, Judge Embry's issuing of the warrant was appropriate.

For the reasons set forth herein, the denial of the motion to suppress, the judgment, and the sentence of the Grayson Circuit Court are affirmed.

All sitting. All concur.

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