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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 19, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000523-MR

NOEL LEE JENKINS — APPELLANT

V.

ON APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
NO. 05-CR-000030

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REMANDING

Appellant, Noel Lee Jenkins, appeals his convictions for manufacturing methamphetamine (first offense), possession of marijuana, possession of drug paraphernalia (second offense), and for being a persistent felony offender in the second degree. The Monroe Circuit Court sentenced him to fifty years' imprisonment on the manufacturing charge, five years on the paraphernalia charge, and twelve months on the marijuana charge, to be run concurrently. He now appeals to this Court as a matter of right. Ky. Const. §110(b). For the reasons set forth herein, this matter is remanded to the Monroe Circuit Court.

In April 2005, the Monroe County Sheriff's Department received information that there was illegal drug activity occurring on a farm owned by Appellant's father, Noel C. Jenkins. Appellant resided on this property along with his parents, although he lived in a separate structure that was described as a "converted calf barn." The interest of the sheriff's department was piqued because they had received prior complaints concerning

the Jenkins's farm. On April 26, 2005, Deputy Lucas Geralds went to the property to determine if he could observe any suspicious behavior. Later that day, Deputy Geralds signed an affidavit to obtain a search warrant of the converted calf barn. The warrant was issued, and the affidavit for the warrant states, in pertinent part:

> "Affiant has been an officer in the aforementioned agency for a period of 3 years and 1 month . . . Affiant received information from a confidential informant that Lee Jenkins had methamphetamine, marijuana and the ingredients to manufacture methamphetamine. All of the items were for sale. Acting on the information received, Affiant conducted the following independent investigation: Completed a drive-by of the premises. The vehicles as described by the Confidential Informant were present and a high volume of traffic has been observed entering and exiting the premises. Affiant has reasonable and probable cause to believe, and believes, grounds exist for issuance of a search warrant based on the aforementioned facts, information and circumstances[.]"

Deputies executed a search of the barn the same day. They found varying amounts of the chemicals used to produce methamphetamine, as well as marijuana and drug paraphernalia. Appellant was subsequently indicted by a Monroe County grand jury and tried. He was found guilty of the above-enumerated charges and sentenced to fifty years' imprisonment. In his appeal to this Court, he raises four issues for review.

Appellant first argues that the search warrant was invalid because it was not supported by probable cause. More specifically, Appellant points out that the affidavit upon which probable cause was based did not describe the informant's reliability or basis of knowledge, and that the officers failed to adequately corroborate the tip. Appellant also alleges that the affidavit included misleading information.

The U.S. Supreme Court, in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), set forth the test for determining whether an informant's tip provided probable cause for the issuance of a search warrant. Under this test, the issuing magistrate 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." Id. at 238, 103 S.Ct. at 2332. Furthermore, the U.S. Supreme Court has "consistently recognized the value of corroboration of details of an informant's tip by independent police work." Id. at 241, 103 S.Ct. at 2334. As such, "[t]ypically a bare and uncorroborated tip received from a confidential informant, without more, would be insufficient to establish probable cause for a search warrant." Lovett v. Commonwealth, 103 S.W.3d 72, 78 (Ky. 2003). Rather, the totality of the circumstances test in Gates requires an assessment of the relative indicia of reliability accompanying the tip, including independent police corroboration.

Deputy Eddie Murphy testified at the suppression hearing. He stated that the confidential informant was known to the officers and had provided credible information in the past. The confidential informant had approached Deputies Geralds and Murphy in person. Deputy Murphy also testified that the sheriff's department had previously received "complaints" about "that area" – presumably, the 500-acre Jenkins farm. However, during another portion of his testimony, Deputy Murphy explained that people were known to congregate near a bridge and creek at the back of the Jenkins's property for the purpose of swimming, drinking, and "partying." Deputy Murphy's testimony was unclear as to whether the previous complaints specifically concerned drug activity, or the fact that large numbers of people convened on the property.

Little else is known about the confidential informant in this case. The affidavit itself fails to state that the informant had provided reliable information in the past. Instead, it simply states: "Affiant received information from a confidential informant that Lee Jenkins had methamphetamine, marijuana and the ingredients to manufacture

methamphetamine." If the tipster in this case provided more detailed information, it was not included in the affidavit, nor was it described at the suppression hearing.

The affidavit in this case is nearly identical to the "bare bones" affidavits specifically condemned in Gates. "An officer's statement that 'affiants have received reliable information from a credible person and do believe'. . . is likewise inadequate. [T]his is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Id. at 239, 103 S.Ct. at 2332-33 (internal citations omitted). Certainly, a higher level of credibility is lent to informants who identify themselves to police officers or who have given information in the past. See Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). However, neither the issuing judge nor the trial court in this case was given any information upon which to assess the informant's reliability independently, such as the number of credible tips previously provided by the informant or the informant's basis of knowledge. Furthermore, the tip itself provided little indication of its reliability. It was extremely general in its assertion of illegality; it did not reveal the informant's intimate knowledge of either the Appellant or the property; and it lacked any predictive information whatsoever. Cf. Williams v. Commonwealth, 147 S.W.3d 1, 8 (Ky. 2004) (probable cause established based on informant's tip that accurately described the suspect, the specific location of contraband, and the suspect's future actions).

A deficiency in the reliability of an informant's tip can be cured by independent police investigation and corroboration. Such did not occur in this case. Deputy Murphy testified that after the tip was received, Deputy Geralds went to the property to conduct

surveillance which lasted for about thirty minutes. At trial, Deputy Geralds testified that he conducted surveillance of a private road that ran between Appellant's residence (that is, the converted calf barn) and other buildings on the farm, including the home of Appellant's parents. During this thirty-minute period, Deputy Geralds observed one vehicle entering that road, and another vehicle exiting that road onto the main highway.

However, in the affidavit, Deputy Geralds described his independent investigation as follows: "Completed a drive-by of the premises. The vehicles described by the Confidential Informant were present and a high volume of traffic has been observed entering and exiting the premises." Again, it is unclear whether the confidential informant had described specific vehicles, or had simply described that a high volume of vehicles were present on the farm. At any rate, it cannot be fairly stated that Deputy Geralds himself observed a "high volume of traffic," as two vehicles in thirty minutes does not constitute "traffic" even in rural Monroe County. Furthermore, given the deputies' knowledge that large numbers of people gathered around the creek on the Jenkins's farm, the presence of two vehicles can hardly suffice as corroboration of illegal drug activity. Cf. Brown v. Commonwealth, 711 S.W.2d 488, 490 (Ky. 1986) (where prior police reports describing specific stolen property adequately corroborated informant's tip regarding the same property to create probable cause).

Our standard of review of the denial of a motion to suppress is two-fold. The factual findings of the trial court are reviewed for clear error, while its legal conclusions are reviewed de novo. Cummings v. Commonwealth, 226 S.W.3d 62, 65 (Ky. 2007). Examining the totality of the circumstances as presented to the trial court, we must conclude that it erred in finding the existence of probable cause. Though provided by a known informant, the tip in this case was a bare assertion of illegality bearing little

indication of reliability. Furthermore, the tip was not adequately corroborated by independent police investigation. Given all of the circumstances available to the deputies prior to the search, there was no "fair probability" that illegal contraband would be found. At best, it was merely a possibility. As such, the trial court erred in failing to grant Appellant's motion to suppress.

The Commonwealth urges that, even if not based on probable cause, the search of Appellant's property fell within the "good faith" exception to the exclusionary rule espoused in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and adopted by this Court in Crayton v. Commonwealth, 846 S.W.2d 684 (Ky. 1992). The trial court noted in its findings that, even if probable cause did not exist in this case, it believed the warrant fell within the Leon exception. The Court in Leon examined the deterrent effect of suppression against the cost to society and the administration of justice by exclusion of otherwise trustworthy evidence, and concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." Leon, 468 U.S. at 922, 104 S.Ct. at 3420. Thus, when an officer prepares an affidavit in good faith and a warrant is issued by a detached and neutral magistrate, subsequent invalidation of that search warrant will not result in suppression of the evidence. We have explained the rationale behind this "good faith" exception. "As the responsibility for determining whether a search warrant should issue rests with the judicial officer to whom the affidavit is presented, suppression of the evidence thereafter can have no deterrent effect upon police misconduct." Crayton, 846 S.W.2d at 688.

That is not to say that the exclusionary rule is wholly inapplicable where the evidence was obtained pursuant to a search warrant. We explained in Crayton:

> There is a popular but erroneous belief that the Leon Court eviscerated the exclusionary rule when the evidence is obtained pursuant to a search warrant. In fact, the Court held that the officer must have an objectively reasonable belief in the sufficiency of the warrant and the probable cause determination. If the affidavit contains false or misleading information, the officer's reliance cannot be reasonable. Likewise, the Court retained the exclusionary rule and applied no presumption of validity in cases of abandonment by the judge of a detached and neutral role, and in cases where the officer's belief in the existence of probable cause is entirely unreasonable. Finally, suppression was retained as a remedy where the warrant is facially deficient by failing to describe the place to be searched or the thing to be seized. In sum, the court imposed a standard of objective reasonableness on police activity and retained the suppression remedy when police conduct falls below that standard.

Crayton, 846 S.W.2d at 687-88.

Thus, even when a search is conducted pursuant to a warrant, the exclusionary rule is still available in four instances: (1) where the issuing judge relied on information in the affidavit that the affiant knew to be false or misleading; (2) where the issuing judge or magistrate has abandoned the requisite detached and neutral role; (3) where the affidavit is so lacking in indicia of probable cause that no law enforcement official could reasonably believe in the warrant's validity; and (4) where the affidavit is facially deficient due to its lack of particularity in describing the place of the search or the evidence to be seized.

The affidavit in this case provided virtually no substantive detail concerning the particulars of the confidential tip or the tipster's reliability. As such, independent police corroboration of the tip became vital, and we have little doubt that the issuing judge relied heavily on this element in determining that probable cause existed. However, at trial it was revealed that the sole piece of

collaboration included in the affidavit – that is, the "high volume of traffic" observed by Deputy Geralds – was a misleading statement that did not accurately reflect what was actually observed.[1]

"Statements in an affidavit that are intentionally false or made with reckless disregard for the truth must be stricken." United States v. Ayen, 997 F.2d 1150, 1152 (6th Cir. 1993), citing Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). "After setting aside the affidavit's false material, if the remaining content of the affidavit is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search must be suppressed." Id. Procedurally, when a defendant makes the threshold showing that an affidavit contains intentionally false or misleading information, he is entitled to a hearing pursuant to Franks v. Delaware, id. It is the defendant's burden at this hearing to establish that the statements were made intentionally or with reckless disregard for the truth, that the deliberate falsity or reckless disregard is that of the affiant, that negligence or mistake does not account for the falsity, and that the falsehoods were material. Id.

However, when Deputy Geralds testified at trial that he had actually only observed two cars entering and exiting the Jenkins's property, defense counsel did not object, nor did defense counsel renew the motion to suppress or request

[1] Deputy Geralds indicated at trial that he had observed a "high volume" of traffic at the Jenkins's farm in the year preceding this search. However, the statement in the affidavit does not refer to his prior observations, but rather his observations during the surveillance conducted immediately following the informant's tip.

a Franks hearing.[2] Accordingly, the trial court was not given the opportunity to determine whether Deputy Geralds's statement in the affidavit was intentionally misleading or false. Nonetheless, on appeal Appellant has made a compelling argument, supported by the record, that Deputy Geralds's statement in the affidavit was a misleading and inaccurate representation of his observations. Appellant's substantial rights would certainly be infringed upon if it is determined that the search warrant was improperly issued, and for this reason we consider the argument, even though not properly preserved. RCr 10.26.

Accordingly, we must remand this matter to the Monroe Circuit Court with directions to conduct a hearing pursuant to Franks to determine the applicability of the Leon good faith exception in light of Deputy Geralds's testimony at trial. Appellant's additional assignments of error are abated pending the outcome of such hearing.

All sitting. Lambert, C.J.; Abramson, Cunningham, Minton, and Noble, JJ., concur. Scott, J., concurs in part and dissents in part by separate opinion in which Schroder, J., joins.

[2] Prior to Deputy Geralds's testimony concerning his surveillance, defense counsel renewed the suppression motion on other grounds. Deputy Geralds's testimony at trial revealed that buildings not listed on the search warrant were searched, a fact not indicated by Deputy Murphy during the suppression hearing. The trial court denied the request to revisit the issue of suppression.

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OPINION BY JUSTICE SCOTT

CONCURRING IN PART AND DISSENTING IN PART

Although I concur with the majority on the other issues, I must respectfully dissent from their decision to remand this case for a Franks[1] hearing, to determine the application of United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

In Leon, "the Court held that the officer must have an objectively reasonable belief in the sufficiency of the warrant and the probable cause determination. If the affidavit contains false or misleading information, the officer's reliance cannot be reasonable." Crayton v. Commonwealth, 846 S.W.2d 684, 687, 688 (Ky. 1992). Given that two vehicles within a one-half hour time span is not a high volume of traffic, the officer's reliance could not have met the required standard under Leon to save the search warrant. Therefore, I would vacate the conviction given that the evidence should have been suppressed.

Schroder, J., joins this dissent.

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[1] See Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).