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RENDERED: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000444-MR

ROGER SAPP — APPELLANT

V.

ON APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 10-CR-00006

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2010-SC-000445-MR

TONJA SAPP — APPELLANT

V.

ON APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 10-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Owensboro Police Officer, Fred Coomes, arrested Carlos Carlisle on February 18, 2010, though the record is unclear as to Carlisle's offense. In questioning Carlisle, Officer Coomes learned that he was en route to the residence of Appellant, Roger Sapp, to buy methamphetamine. Officer Coomes

checked Carlisle's cell phone which indicated that Carlisle had placed a call to Sapp within the previous thirty minutes. Carlisle also said that he owed Sapp $150 from a prior meth purchase, and that he had recouped the money by selling the meth himself.

Coomes called McLean County Sheriff, Frank Cox, to relay this information. Sheriff Cox knew Sapp had a reputation in the area as a drug dealer. He spoke with Kentucky State Police Detective Matt Conley, who informed him that Sapp had been implicated as the source in several drug deals. Sapp had also been previously convicted of multiple counts of possession of a controlled substance.

Based on this information, Sheriff Cox submitted an affidavit for a search warrant of Roger Sapp's home. It stated:

> On February 18, 2010, at about 5:30 p.m. I was contacted by Detective Coomes of the Owensboro Police Department. Coomes said that they had just taken Carlos Eugene Carlisle into custody. Carlisle told Coomes that he was on the way to buy methamphetamine from Roger O. Sapp at 235 School Street, Island, Kentucky. Sapp was currently holding meth at his home for sale to Carlisle. Coomes further told me that a check of Carlisle's cell phone revealed that he had communicated with Roger Sapp's known phone number within the last two hours. Carlisle stated that he owed Sapp $150 for meth previously purchased. He said that Sapp would front him the drugs for payment after Carlisle had sold them to others. I knew that Sapp had a reputation among area police agencies as a major drug dealer. I spoke with Det. Matt Conley, a narcotic detective with Kentucky State police who informed me that Sapp had been implicated in several drug deals as the source of the drugs. Sapp has been convicted of multiple drug offenses.

The warrant was issued and the sheriff's department conducted a search of Sapp's house which resulted in the seizure of meth, cash, and various pieces of equipment for making and using meth. Roger Sapp and his wife, Tonja, were arrested that night. Roger was eventually indicted on five counts, both as a principal and as a complicitor: manufacturing methamphetamine; trafficking in a controlled substance; possession of a controlled substance; possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine; and possession of drug paraphernalia (second or greater offense). In addition, he was also charged with being a persistent felony offender (PFO) in the first degree. Tonja was charged with four counts, also as both a principal and a complicitor: manufacturing methamphetamine; trafficking in a controlled substance; possession of a controlled substance; and possession of anhydrous ammonia in an unapproved container. She too was charged with being a PFO in the first degree. Both defendants moved to suppress all of the evidence seized during the search, arguing that probable cause did not exist for the issuance of the warrant.

Following an evidentiary hearing, the McLean Circuit Court found that probable cause existed for the issuance of the warrant. Specifically, it found that Carlisle's statements were corroborated by Sheriff Cox's prior knowledge of Roger Sapp and by Coomes's examination of Carlisle's cell phone. The court was also persuaded by the fact that Carlisle was a named informant who established his basis for knowledge. Finally, the court took into account

Sapp's prior criminal history of drug-related offenses and his implication in drug investigations of other agencies.

Both Roger and Tonja Sapp entered conditional guilty pleas. Roger's punishment was fixed at imprisonment for a term of nineteen years on each of the first four counts, enhanced to twenty-five years by virtue of the PFO conviction. Roger was also sentenced to imprisonment for a term of five years on the possession of drug paraphernalia charge. The sentences were ordered to run concurrently for a total term of imprisonment for twenty-five years. Tonja was sentenced to imprisonment for a term of nineteen years on each count, enhanced to twenty years by virtue of the PFO charge. The sentences were also ordered to run concurrently for a total term of imprisonment for twenty years.

Both Appellants reserved the right to challenge the sufficiency of the search warrant. Roger Sapp also argues that his five-year sentence for possession of drug paraphernalia should be amended because it was a misdemeanor at the time he was sentenced. Because both Appellants raise an identical issue for review, we have combined the appeals into one opinion. For the reasons set forth herein, we affirm.[1]

On appellate review of a motion to suppress where a search warrant was issued, we first determine if the facts found by the trial judge are supported by substantial evidence. RCr 9.78. Next, we consider whether the trial court

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[1] The Commonwealth's motion to strike is granted. The information that is the subject of Appellant Tonja Sapp's request for judicial notice is wholly irrelevant to the issues raised on appeal.

"correctly determined that the issuing judge did or did not have a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Pride v. Commonwealth*, 302 S.W.3d 43, 49 (Ky. 2010) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)). We give great deference to the decision of the judge issuing the warrant and limit our analysis to the totality of the circumstances presented in the four corners of the affidavit. *Id.*

As both Appellants seem to concede, the trial judge's factual findings are supported by substantial evidence. However, both argue that the facts, as set forth in the affidavit, were insufficient to establish probable cause. They point to several deficiencies in Sheriff Cox's stated basis for the search.

First, Appellants claim that, although Carlos Carlisle is a named informant in the affidavit, there is no explanation of his reliability. Further, they state that Carlisle's tip contained no predictive information and lacked any specificity that criminal activity was occurring at the residence of Roger Sapp. Other than verifying that Carlisle had placed a phone call to Roger Sapp within the previous thirty minutes, the officer did not independently verify Carlisle's allegations. Appellants point out that Officer Coomes did not even check Carlisle's person to verify that he was carrying the $150 he allegedly owed Roger Sapp. They also argue that Carlisle provided this information following his own arrest, rendering any statements self-serving and unreliable. Finally, they state that there is nothing in the affidavit to substantiate the suspicions and allegations regarding Roger Sapp's drug dealing activities. Indeed, his prior convictions were all for *possession* of controlled substances.

We believe that the information presented in the affidavit was sufficient to provide the judge issuing the search warrant with the requisite "substantial basis" for concluding that probable cause existed.

Appellants erroneously devalue the fact that Carlisle is a named informant. "The general rule has long been that an affidavit for a search warrant based on information furnished by a named individual is ordinarily sufficient to support the warrant." *Embry v. Commonwealth*, 492 S.W.2d 929, 931 (Ky. 1973). *See also Carrier v. Commonwealth*, 142 S.W.3d 670 (Ky. 2004) (warrant to search psychologist's records for patient's alleged confession to sexual abuse was valid, though based solely on the statements of victims). When the informant is identified, there is no need for a specific showing of his or her reliability. *Embry,* 492 S.W.2d at 931.

Even so, Carlisle indicated that his basis of knowledge was his own personal experience and observations. As explained in the affidavit, Carlisle identified Roger Sapp's exact street address. Carlisle stated that he had previously bought meth from Roger Sapp and that he was on his way to Sapp's residence for that specific purpose. "When a witness has seen evidence in a specific location in the immediate past, and is willing to be named in the affidavit, the totality of the circumstances presents a substantial basis for conducting a search for that evidence." *U.S. v. Pelham*, 801 F.2d 875, 878 (6th Cir. 1986) (internal quotations omitted). Though the affidavit does not specifically state that Carlisle had purchased meth while at Sapp's residence, the issuing judge is entitled to draw fair and reasonable inferences from the

information provided and the type of offense alleged. It has previously been stated that "in the case of drug dealers evidence is likely to be found where the dealers live." *Beckam v. Commonwealth*, 284 S.W.3d 547, 550 (Ky.App. 2009) (quoting *United States v. Reddrick*, 90 F.3d 1276, 1281 (7th Cir. 1996)).

Further, Carlisle provided information against his own penal interest. He admitted to previously purchasing methamphetamine from Roger Sapp and to selling it himself. "Admissions of crime . . . carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search." *Lovett v. Commonwealth*, 103 S.W.3d 72, 78-79 (Ky. 2003).

Finally, we take into account the fact that Sheriff Cox was familiar with Roger Sapp and his prior convictions for drug-related offenses. Moreover, through discussions with Detective Conley, Cox learned that Sapp was implicated in several other drug trafficking investigations. An officer's knowledge about a suspect's prior record can be a relevant factor. *See Commonwealth v. Morgan*, 248 S.W.3d 538, 542 (Ky. 2008) (considering legality of a warrantless stop and search).

When looking at the totality of the circumstances presented to the issuing judge, we find that there was sufficient evidence to establish probable cause to issue the search warrant. The trial court correctly denied Appellants' motion to suppress.

As a final matter, Roger Sapp asks this Court to amend the five-year sentence handed down for his conviction of possession of drug paraphernalia (second offense or greater) because it was a misdemeanor at the time he was

sentenced. Indeed, KRS 218A.500(5) was amended to remove the second or subsequent offense aggravator for drug paraphernalia charges and became effective on April 26, 2010. Roger Sapp committed his crime in February of 2010, but entered his guilty plea on May 24, 2010, after the effective date of the amendment. However, KRS 446.110 requires the consent of the defendant in order to be applied "to any judgment pronounced after the new law takes effect." Roger Sapp did not consent to application of the new statute and, therefore, has waived any challenge to his sentence.

For the foregoing reasons, the judgments of the McLean Circuit Court as to both Appellants are affirmed.

Minton, C.J.; Abramson, Cunningham, Schroder, Scott and Venters, JJ., concur. Noble, J., concurs in result only.

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