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NOT TO BE PUBLISHED OPINION

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2013-SC-000284-MR

JEFFREY SCOTT BROTHERS

APPELLANT

V. ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HON. BRIAN WIGGINS, JUDGE
CASE NO. 13-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Jeffrey Scott Brothers (Brothers) entered a conditional plea of guilty to: two counts of sodomy in the first degree, one count of possession of matter portraying a sexual performance by a minor, and four counts of sexual abuse in the first degree. Brothers was sentenced to thirty-five years' imprisonment for each sodomy conviction, five years' imprisonment on each possession of matter portraying a sexual performance by a minor conviction, and ten years' imprisonment for each sexual abuse conviction, with sentences to run concurrently.

Brothers appeals as a matter of right, arguing that the trial court erroneously denied his motion to suppress evidence obtained during the search of Brothers's residence, vehicle, and person. He maintains that the search was in violation of the Fourth Amendment of the United States Constitution and

Section 10 of the Kentucky Constitution. Having reviewed the record and the arguments of the parties, we affirm the trial court's ruling.

I. FACTS.

On November 1, 2012, Whitney Burden (Burden) contacted her high school guidance counselor, Beth Fleming (Fleming). Burden reported seeing an explicit image of her five-year-old niece on Brothers's digital camera three days before, which Burden photographed with her cell phone camera. After seeing the photograph, Fleming contacted Muhlenberg County Sheriff's Department Detective Bob Jenkins (Jenkins). Jenkins, in turn, relayed this information to Central City Police Department Detective Steve Casey (Casey).

Based on the information he received, along with a copy of the photograph, Detective Casey filed an affidavit in Muhlenberg District Court seeking a warrant authorizing a search of Brothers's residence, person, and vehicle for any electronic device capable of capturing or storing photographs. On November 1, 2012, the Muhlenberg District Court issued the warrant. That same day, Detective Casey executed the warrant at Brothers's residence and found additional explicit photographs of minors, the digital camera that was used to take the subject photograph, a pair of children's underwear, and various electronic devices.

A Muhlenberg County Grand Jury indicted Brothers with: two counts of sodomy in the first degree; four counts of possession of matter portraying a sexual performance by a minor; and four counts of sexual abuse in the first degree. Brothers, arguing a lack of probable cause, subsequently filed a

motion to suppress, asking the circuit court to exclude all the evidence seized pursuant to the search warrant. The circuit court denied Brothers's motion, finding that the supporting affidavit contained sufficient information to support the issuance of the search warrant in question.

Following the circuit court's ruling, Brothers entered a conditional plea of guilty to eight of the ten charges. The Commonwealth agreed to dismiss the remaining charges, and recommended a sentence of thirty-five years' imprisonment, which the court then imposed.

Brothers appeals as a matter of right, arguing that the circuit court erroneously denied his motion to suppress. We disagree and, for the reasons set forth below, affirm the circuit court's ruling.

II. STANDARD OF REVIEW.

When a trial court is faced with a motion to suppress evidence pursuant to a search warrant, the trial court must determine whether, under the totality of the circumstances, the warrant-issuing judge had a substantial basis for concluding that probable cause existed. *Commonwealth v. Pride*, 302 S.W.3d 43, 47 (Ky. 2010). The trial court need only "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." *Illinois v. Gates*, 462 U.S. 213, 238 (2012). Additionally, the trial court should give great deference to the warrant-issuing judge's determination of probable cause. *Id.* at 213.

Our standard of review of a ruling on a motion to suppress is two-fold. First, we must determine whether the lower court's findings of fact were supported by substantial evidence. If so, such findings are conclusive. Kentucky Rule of Criminal Procedure (RCr) 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). Second, we must perform a *de novo* review of those factual findings to determine whether the decision is correct as a matter of law. *Ornelas v. United States*, 517 U.S. 690 (1996); *Commonwealth v. Marr*, 250 S.W.3d 624, 626 (Ky. 2008).

III. ANALYSIS.

Brothers argues that Detective Casey's affidavit did not establish probable cause sufficient to support the district court's issuance of the search warrant for two reasons. First, Brothers argues that, because Detective Casey had not spoken with Burden, he was required to conduct an independent investigation of her veracity and/or reliability. We disagree.

As the circuit court judge correctly stated in his order denying Brothers's motion to suppress, information provided by a named individual is ordinarily sufficient to support a search warrant. *Embry v. Commonwealth*, 492 S.W.2d 929, 931 (Ky. 1973). "[T]he fact that a warrant does not contain recitations of a named informant's veracity or reliability does not prove that the warrant was issued without probable cause." *Goncalves v. Commonwealth*, 404 S.W.3d 180, 192 (Ky. 2013) (citing *Lovett v. Commonwealth*, 103 S.W.3d 72 (Ky. 2003)).

In support of his argument, Brothers relies on *United States v. Sonagere*, 30 F.3d 51, 53 (6th. Cir. 1994), asserting that, in addition to Casey's affidavit

detailing allegations of wrongdoing, an independent investigation of Burden's veracity and reliability is also required in order to establish probable cause. However, Brothers's reliance on *Sonagere* is misplaced. The affidavit at issue in *Sonagere* turned on information provided by a confidential informant. *Id.* at 52. Here, Burden was not a confidential informant, but a named individual whose information was provided in detail within the affidavit. *See* 492 S.W.2d at 932. As such, no additional independent investigation showing Burden's veracity or reliability was required in order to establish probable cause. *Id.* at 931.

Second, Brothers argues that probable cause was lacking because no nexus existed between the explicit photograph and Brothers's taking of the photograph. Again, we disagree.

The cell phone version of the explicit photograph of a minor on Brothers's digital camera was evidence of a crime in itself. Kentucky Revised Statute 531.335. Therefore, at the time the warrant was issued, whether or not Brothers actually took the photograph was immaterial.

Finally, we note that the totality of the circumstances was such that the circuit court judge was able to make an independent judgment based on the information contained solely within the four corners of the affidavit. *See Ruth v. Commonwealth*, 298 S.W.2d 300, 301 (Ky. 1957). The affidavit contained the name of the informant, the explicit photograph, the date the informant witnessed and captured the explicit photograph, and the name of the owner of the digital camera that contained the explicit photograph. These facts in the

affidavit supported a “common sense” determination by the warrant-issuing judge that there was probable cause to search Brothers’s residence, vehicle, and person. 462 U.S. at 238; *see* 404 S.W.3d at 192 (Ky. 2013).

IV. CONCLUSION.

Therefore, we hold that the district court judge had a substantial basis for concluding that a search of Brothers’s residence, vehicle, and person would reveal further evidence of crime. As such, the district court judge had probable cause for issuing the search warrant, and the circuit court judge correctly denied Brothers’s motion to suppress. Accordingly, the order of the Muhlenberg Circuit Court, denying Brothers’s motion to suppress evidence found as a result of a properly issued and executed search warrant, is **AFFIRMED.**

All sitting. All concur.

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