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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: DECEMBER 17, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000158-MR

JENNY GIBSON — APPELLANT

V.

ON APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE JAY DELANEY, JUDGE
NO. 13-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jenny Gibson, appeals from a judgment of the Pendleton Circuit Court convicting her of manufacturing methamphetamine, first offense, and sentencing her to a twenty year prison term. She contends that the trial court erred by failing to suppress the evidence seized from her property pursuant to a defective search warrant. For the reasons explained below, we conclude that the search warrant was valid. We affirm the judgment of the Pendleton Circuit Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pendleton County Sheriff Craig Peeples began to suspect that Appellant was manufacturing methamphetamine on her property on Kennedy Ridge in Pendleton County. He started tracking her unusually large purchases of

"ephedrine,"[1] an ingredient required for manufacturing methamphetamine. With the cooperation of a local hardware store, he also tracked her purchases of other items associated with the manufacture of methamphetamine, including Drano and lye.

After several months of collecting information about these unusual purchases, Sheriff Peeples sought a search warrant to search the property owned by Appellant on Kennedy Ridge Road in Pendleton County, specifically a blue metal garage on the property. Peeples executed a sworn affidavit in support of his request for a warrant. Among other averments, Peeples swore that "the [blue metal] garage is located on property where two fires have occurred over the last several years . . . which was a result of manufacturing methamphetamine." Peeples also stated in the affidavit that Appellant "has priors for possession of controlled substances and drug paraphernalia." The search warrant was issued. While executing the warrant, Peeples discovered an abundance of evidence indicating that a methamphetamine lab was being operated on Appellant's property.

Based upon the evidence seized as a result of the search, Appellant was charged with manufacturing methamphetamine. She moved to suppress the evidence discovered on her property, arguing that the affidavit contained two

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[1] In the affidavit supporting the search warrant, Sheriff Peeples used the word "ephedrine" in reference to the pharmaceutical product commonly used for the production of methamphetamine. In the briefs of both parties, the substance is referred to by its proper name: "pseudoephedrine." To be consistent with the arguments presented in the briefs, we use the term "pseudoephedrine" except when directly quoting the sheriff's use of "ephedrine."

recklessly false and misleading assertions of fact without which the affidavit would not establish probable cause for the issuance of the warrant. The statements cited by Appellant as false are Sheriff Peeples' claims that: 1) Appellant had prior drug convictions, particularly for possession of a controlled substance; and 2) two methamphetamine-related fires had occurred on Appellant's land.

Following a suppression hearing, the trial court agreed with Appellant that the sheriff's statement assigning to Appellant a record of prior criminal offenses, possession of a controlled substance and drug paraphernalia, was false, and that its use in the affidavit demonstrated a reckless disregard for the truth. Consequently, the trial court excluded the statement about the Appellant's criminal record when assessing the validity of the warrant. The trial court further found that, although the statement about the two fires was untrue, Peeples had not deliberately or recklessly misrepresented the facts. The trial court concluded that the inaccurate information about fires on Appellant's property should, therefore, not be purged from the affidavit.

Examining the sufficiency of the affidavit with only the false information about Appellant's prior convictions excluded, the trial court determined that sufficient credible information remained to establish probable cause for the issuance of the warrant. As such, the evidence was admitted at trial.

II. THE TRIAL COURT DID NOT ERR IN ITS EVALUATION OF SHERIFF PEEPLES' AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT

Appellant argues that the warrant was invalid because Sheriff Peeples' affidavit, even with all of its original allegations, did not establish probable cause to justify the issuance of a warrant to search her Kennedy Ridge property.[2] She argues in the alternative that, even if the original affidavit did establish probable cause, the excision of her prior convictions and the false information regarding the fires renders it insufficient to establish probable cause. Appellant further argues that the affidavit impermissibly linked her to pseudoephedrine purchases made by other individuals, and that it included stale information unjustly included in the probable cause determination.

"It is well established that '[s]earch warrants must be supported by probable cause to satisfy the dictates of the Fourth Amendment.'" *Minks v. Commonwealth*, 427 S.W.3d 802, 809 (Ky. 2014) (quoting *United States v. Wilhelm*, 80 F.3d 116, 118 (4th Cir. 1996) (citing *United States v. Harris*, 403 U.S. 573, 577 (1971)). To assess probable cause in the context of a search warrant we adopted the "totality of the circumstances" standard pronounced by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213 (1983). *Beemer v. Commonwealth*, 665 S.W.2d 912, 914 (Ky. 1984). "Under the *Gates* test, the warrant-issuing judge is not required to attest to the validity of the

[2] Appellant's argument occasionally interchanges references to the *search warrant* with references to the *affidavit* supporting the warrant. For example, she argues that "false statements contained in the search warrant were made in reckless disregard for the truth." We construe references to deficiencies in the *warrant* to include, as the context of the argument requires, the *affidavit* supporting the warrant.

information provided in the warrant, but rather 'to 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.'" *Minks*, 427 S.W.3d at 808 (quoting *Gates*, 462 U.S. at 238). "In turn, the reviewing court 'ensures that the warrant-issuing judge had a substantial basis for concluding that probable cause existed.'" *Id.*

A trial court reviewing the sufficiency of the affidavit upon which a search warrant was issued must "determine whether under the totality of the circumstances presented within the four corners of the affidavit, a warrant-issuing judge had a substantial basis for concluding that probable cause existed." *Commonwealth v. Pride*, 302 S.W.3d 43, 49 (Ky. 2010). However, in reviewing the affidavit, intentionally false statements or statements made with reckless disregard for the truth must be stricken. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). *Franks* sets forth the following procedure:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. 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.* at 156.

To sustain her attack on the validity of the search of her property, Appellant must show "that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause." *Commonwealth v. Smith*, 898 S.W.2d 496, 503 (Ky. App. 1995). Following an evidentiary hearing consistent with the foregoing requirements, the trial court made the following findings relevant to our review:

> As to the statement about [Appellant's criminal] record, the Court finds that this statement was made with reckless disregard for the truth. Although the Defendant had been charged with these offenses on a prior occasion, one of the offenses was amended and one merged. The Court will exclude this statement from consideration.
>
> [Appellant] also alleges that the previous fires noted in the affidavit did not occur on [her] property, but on adjoining property owned by [Appellant's] sister. The Commonwealth concedes this fact to be true. However, there is no evidence before the Court that this statement was made by the affiant knowing that it was a misstatement. Likewise, there is no evidence that the statement was made with reckless disregard for the truth. . . . The properties owned by [Appellant] and her sister adjoin one another and there is no evidence that this misstatement is anything more than a simple mistake.
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> [A]fter excluding the statement regarding [Appellant's] prior record, the Court finds that there was probable cause for issuance of the warrant. [Appellant] and her associates were making a large number of ephedrine purchases. [Appellant] was also purchasing other items used to manufacture methamphetamine. One of the associates of [Appellant] had a prior conviction for possessing methamphetamine. The court did not exclude the statements regarding the prior fires and those prior fires serve to link these

> purchases to the garage which was searched on Kennedy Ridge Road.
>
> In light of all the foregoing, the Court finds that there was probable cause for issuance of the search warrant in this case.

In *Pride*, we articulated the following standard for appellate review of a trial court's review of the sufficiency of an affidavit used to support a search warrant:

> The proper test for appellate review of a suppression hearing ruling regarding a search pursuant to a warrant is to determine first if the facts found by the trial judge are supported by substantial evidence, RCr 9.78,[3] and then to determine whether the trial judge correctly determined that the issuing judge did or did not have a 'substantial basis for . . . conclud[ing]' that probable cause existed. In doing so, all reviewing courts must give great deference to the warrant-issuing judge's decision.

302 S.W.3d at 49 (footnotes and citations omitted).

Appellant agrees that in reviewing the sufficiency of the affidavit, the trial court properly removed from consideration the erroneous reference to her criminal record. However, she contends that the trial court clearly erred in finding that the sheriff's inaccurate reference to fires on her property was merely "a simple mistake" rather than a deliberate or reckless disregard for the truth. Appellant insists that the false statement about the fires should also have been stricken from the affidavit before weighing its sufficiency to support the search warrant.

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[3] At the time of Appellant's trial, RCr 9.78 was in effect and governed appellate review of rulings on pretrial motions to suppress evidence. Effective January 1, 2015, RCr 9.78 was superseded by RCr 8.27; however, the standard for appellate review remains unaffected. *Simpson v Commonwealth* ___ S.W.3d ___, 2015 WL 6591197 (Ky. Oct. 29, 2015).

Upon review, we are satisfied that the trial court's decision concerning that matter is supported by substantial evidence. Sheriff Peeples explained his confusion about the site of the meth-related fires. The fires had actually occurred on the Kennedy Ridge property owned by Appellant's sister, Gina Gibson, which adjoins Appellant's land, and does so without a clearly distinguishable boundary. Given this testimony, the trial court reviewed the affidavit's sufficiency with reference to Appellant's criminal record *excluded* and with reference to the fires *included*.

On appeal, our review of the trial court's ruling regarding the sufficiency of the affidavit, properly purged of its improper information, proceeds with a determination of "whether the trial judge correctly determined that the issuing judge did or did not have a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Pride* 302 S.W.3d at 49. After examining the "corrected" affidavit, we agree with the trial court: sufficient information remained affording the issuing judge substantial basis to have probable cause to believe that evidence of criminal conduct would be found at Appellant's property. To explain, we turn to the affidavit itself.

Purged of its inaccurate reference to Appellant's "priors," Sheriff Peeples' affidavit in support of the search reads as follows:[4]

> [B]y investigation the affiant has been tracking ephedrine purchases from Jenny Gibson, Marty Beagle, Drew Wilson, Lorelei Wilson, George Amburgey since April 2012. On many occasions

[4] The affidavit contains a number of insignificant spelling and grammatical errors. Except for deleting the reference to Appellant's "priors," we reproduce it here as it appeared to the judge who issued the warrant.

the parties are purchasing ephedrine on the same day or within two to three days of each other and have went to a different store on the same day or next day. On June 20 Beagle made purchase from Eastside Pharmacy in Cynthiana driving a white pickup truck and within a half hour later G. Amburgey purchased from the same store and was in the same truck to which Beagle was driving at both times. The parties are purchasing ephedrine so often that they are reaching their limits of 7.2 grams w/i 30 days which result in "blocked" purchases. On approximately September 12, 2012 affiant spoke with Cottingham True Value and was advised that Jenny Gibson had purchased a large quantity of drano approximately two weeks ago and that she buys weekly lye or liquid fire one bottle at a time as cash transactions. This corresponds with the August 31, 2012 when she purchased ephedrine from Walmart in Alexandria, with Beagle purchasing on 7/25 CVS – Falmouth, D. Wilson on 7/23 Walgreens – Alexandria, and Amburgey on 7/24 CVS – Falmouth. Gibson and Beagle where seen at Kennedy Ridge location together in April. In prior investigations Beagle and Gibson have been seen on video at Walmart in Alexandria buying ephedrine. Beagle and Wilson scrap and work on cars together, Wilsons wife stated in Circuit Court on 5/20/12 that she was POA for Beagle.

The affidavit further states:

On October 12 affiant received a phone call from Cottingham True Value that Gibson had purchased Camping fuel from there store. On 10/13 received a call from neighbor stating that Gibson was at the garage on Kennedy Ridge. The garage is located on property where two fires have occurred over the last several years with the latest being on or about March 2010 [5] causing severe burns to Gina Gibson which was a result of manufacturing methamphetamine, sister of Jenny. In April the affiant spoke to Gibson while at garage and requested an consentual search which was denied due to Gibson stating that she had to go to work. Beagle has prior for possession of methamphetamine, [inaccurate reference to Appellant's criminal record stricken]. Since Jan. 1, 2012 Gibson has had 31 purchases, 13 blocks, 2 attempts, and 1 return totaling 103.20 grams. Beagle has had 16 purchases, 2 blocks, 1 attempt, 54.10 total grams, G. Amburgey 10 purchases 33.60 grams, D. Wilson 17 purchases, 1 block, 1 attempt for 60.00 grams, L. Wilson 13 purchases, 5 blocks, 1 exceedance, 1 return

[5] This statement is false but was determined by the trial court not to have been deliberately or recklessly made and therefore not subject to purging.

> for 66.00 grams. Derek Amburgey (son of George) has made four purchases since Aug. 3, 2012 with the latest being Oct. 28, 2012. Gibson's last purchase was Nov. 4, 2012 which was blocked. Beagle's was Oct. 17 at Eastside Pharmacy – Cynthiana, which is off of the beaten path from normal buying locations (he has been in KCPC since Oct. 24). G. Amburgey's was Aug. 21. D. Wilson's was Oct. 26 and L. Wilson's was June 29.

Reduced to its basic elements, the affidavit provides: 1) that Appellant, Marty Beagle, Drew Wilson, Lorelei Wilson, and George Amburgey interacted with one another by working, shopping, and traveling together in various pairings to obtain items needed to make methamphetamine; 2) that over a period of several months preceding the search, Appellant and her associates engaged in a coordinated effort to obtain unusual quantities of pseudoephedrine ("ephedrine"), a key ingredient in the manufacture of methamphetamine; 3) that Appellant also purchased unusual quantities of Drano and lye, which also are crucial chemicals used in methamphetamine production; and 4) that two meth-related fires had previously occurred at Appellant's Kennedy Ridge property.[6]

From a "practical, common-sense" standpoint, "given all the circumstances set forth in the affidavit," the foregoing facts create "a fair probability that contraband or evidence of a crime" would be found at Appellant's Kennedy Ridge property. *Minks*, 427 S.W.3d at 808. Based upon the strength of the properly-considered allegations included in the affidavit, we are convinced that the inaccurate information about Appellant's prior criminal

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[6] As discussed above, this final allegation is incorrect, but nevertheless, was a factor that the issuing judge was allowed to consider.

record did not unduly influence the issuing judge so as to result in a search warrant that would not otherwise have been issued. Overall, the false information about Appellant's "priors" added little to the compelling facts that were properly presented.

Appellant further argues that much of the information contained in the affidavit was stale and therefore improperly included in the affidavit; for example, many of the illicit purchases cited by Peeples were several months old. However, that argument is of no avail because the affidavit describes the investigation of a continuous criminal enterprise. Because of the ongoing nature of Appellant's suspicious drug activity, the more recent pseudoephedrine purchases refreshed the relevancy of the earlier purchases, demonstrating that Appellant was continuously engaged in manufacturing methamphetamine, or at least that she was continuously accumulating the ingredients to manufacture methamphetamine. As such, the earlier purchases cited in the affidavit remained relevant. *Ragland v. Commonwealth*, 191 S.W.3d 569, 584 (Ky. 2006) (quoting *United States v. Spikes*, 158 F.3d 913 (6th Cir. 1998)) (a staleness inquiry depends on the nature of the crime and is not based on "an arbitrary time limitation within which discovered facts must be presented to a magistrate"); *United States v. Greany*, 929 F.2d 523, 525 (9th Cir. 1991) ("When the evidence sought is of an ongoing criminal business . . . greater lapses of time are permitted if the evidence in the affidavit shows the probable existence of the activity at an earlier time."); *Emery v. Holmes*, 824

F.2d 143, 149 (1st Cir. 1987) (citations omitted) ("Where recent information corroborates otherwise stale information, probable cause may be found.").

In summary, we find no constitutional infirmity in Sheriff Peeples' affidavit and we conclude that its allegations, as adjusted by the trial court, sufficiently supported the issuance of the associated search warrant. The evidence thus obtained was properly admitted into evidence at trial.[7]

III. CONCLUSION

For the foregoing reasons, the judgment of the Pendleton Circuit Court is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Keller, and Venters, JJ., sitting. All concur. Wright, J., not sitting.

[7] Because of our disposition of the issues, we need not examine Appellant's arguments relating to the applicability of *United States v. Leon*, 468 U.S. 897 (1984), a case which addresses the good faith exception to a facially valid search warrant underpinned by a flawed finding of probable cause.

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