

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

NATHANIEL LAYNE DIGNAZIO

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1089 MDA 2015

Appeal from the Order June 18, 2015
In the Court of Common Pleas of Cumberland County
Criminal Division at No(s): CP-21-CR-0000089-2015

BEFORE: BOWES, J., PANELLA, J., and PLATT, J.*

MEMORANDUM BY PANELLA, J.

FILED FEBRUARY 02, 2016

The Commonwealth of Pennsylvania appeals from the order entered June 18, 2015, in the Court of Common Pleas of Cumberland County, which granted Appellee Nathaniel Layne Dignazio's pretrial motion to suppress evidence. After careful review, we affirm.¹

On August 16, 2014, East Pennsboro Township police officers executed a search warrant for the residence located at 1 South Enola Drive, Apt. 2, Enola, Pennsylvania. The search warrant authorized the officers to search

* Retired Senior Judge assigned to the Superior Court.

¹ This appeal is permissible as of right because the Commonwealth has certified in good faith that the suppression order submitted for our review substantially handicaps the prosecution and the appeal is not intended for delay purposes. **See** Pa.R.A.P. 311(d).

the residence for "any and all iPads, iPods, music players, and a Camo Remington 870-12 [gauge] shotgun." Application for Search Warrant and Authorization, 8/16/14. The affidavit of probable cause in support of the search warrant stated as follows.

Your Aff[ia]nt, Sgt. Adam Shope, is currently a sergeant with the East Pennsboro Township Police Department. Your affiant has been a police officer for the past 18 years. Your affiant was a criminal investigator for 8 years.

On 8/16/2014, at 1500hrs, myself and Det. Rynard spoke with a person at the East Pennsboro police station, that is known to me. This person provided us voluntary information on burglaries and thefts from vehicles that occurred in the borough of Marysville, Perry County, Pa. This person gave this statement knowing about providing false information to police[.]

On 7/24/2014 at 2156hrs, Officer Richards of the Marysville Police reported a burglary at 12 North Main Street, in Marysville, Perry County. The shotgun and numerous items were stolen from the house to include the shotgun. Officer Richards also provided that numerous items were stolen from car breakings inside of the borough. The items were stolen over an 8 month period in the borough.

The person provided me with the following information:

This person was at South Enola Drive, Apt. 2 within the past week. This person witnessed a Camo shotgun that was stolen from 12 South Main Street, Marysville, Perry County, Pa. This person [also] advised there was [sic] numerous iPads, iPods and multiple music players inside of the residence. The items were stolen from a vehicles [sic] in the borough of Marysville over the past 8 months. This person provided a taped statement of the items inside of the residence. This person also provided that all of the stolen property was being held at Dignazio[']s apartment.

At 1630hrs, myself and [an] officer from the East Pennsboro Township Police went to the residence to speak with Dignazio. Dignazio refused to give officers consent to search the house. The house was secured by officers pending a search warrant.

Based on the information, which I believe to be true and correct, I ask that a warrant be issued for 1 South Enola Drive, Enola, Pa. to search for the items listed in the search warrant.

Application for Search Warrant and Authorization, Affidavit of Probable Cause, 8/16/14. Although police seized none of the items listed in the warrant during the search of the premises, various other items allegedly stolen in the area were recovered.

Based upon the items seized from the apartment, Dignazio was charged with four counts of Receiving Stolen Property, 18 Pa.C.S.A. § 3925. Thereafter, Dignazio filed a pretrial motion seeking to suppress the evidence seized from the search. Following a hearing, the suppression court granted Dignazio's suppression motion. In its opinion granting Dignazio's motion, the suppression court found the search warrant fatally flawed as it failed to include sufficient indicia of reliability of the unnamed informant, such that there was no probable cause for the search of the apartment. **See** Suppression Court Opinion, 6/18/15 at 2. This timely appeal followed.

The Commonwealth raises the following issue for our review.

Whether the court erred in suppressing the evidence when the affidavit of probable cause contained information from a known yet unnamed source, whose voluntary statements were taped, regarding specific items stolen from a particular place that were now located in the defendant's home, and the source's information about the thefts was corroborated by the police from the jurisdiction where the thefts occurred?

Commonwealth's Brief at 1.

Our standard of review is settled.

When the Commonwealth appeals from a suppression order, this Court may consider only the evidence from the defendant's

witnesses together with the evidence of the prosecution that, when read in the context of the record as a whole, remains uncontradicted. In our review, we are not bound by the suppression court's conclusions of law, and we must determine if the suppression court properly applied the law to the facts. We defer to the suppression court's findings of fact because, as the finder of fact, it is the suppression court's prerogative to pass on the credibility of the witnesses and the weight to be given to their testimony.

Commonwealth v. Myers, 118 A.3d 1122, 1125 (Pa. Super. 2015) (citation omitted). Here, the suppression court made no findings of fact. Thus, we are tasked with reviewing the court's legal conclusions, for which our standard of review is *de novo*. **See Commonwealth v. Wilson**, 101 A.3d 1151, 1153 (Pa. Super. 2014), *appeal denied*, 121 A.3d 496 (2015).

This Court has recognized that

a determination of probable cause based upon information received from a confidential informant depends upon the informant's reliability and basis of knowledge viewed in a common sense, non-technical manner. Thus, an informant's tip may constitute probable cause where police independently corroborate the tip, or where the informant has provided accurate information of criminal activity in the past, or where the informant himself participated in the criminal activity. The corroboration by police of significant details disclosed by the informant in the affidavit of probable cause meets the [**Illinois v. Gates**, 462 U.S. 213, 238 (1983)] threshold. **Commonwealth v. Sanchez**, 907 A.2d 477, 488 (Pa. 2006), quoting **United States v. Tuttle**, 200 F.3d 892, 894 (6th Cir. 2000) ("[I]nformation received from an informant whose reliability is not established may be sufficient to create probable cause where there is some independent corroboration by police of the informant's information."). . . The linch-pin that has been developed to determine whether it is appropriate to issue a search warrant is the test of probable cause. Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of

reasonable caution in the belief that a search should be conducted.

Commonwealth v. Gagliardi, --- A.3d ---, ---, 2015 WL 7430548 at *5 (Pa. Super., filed Nov. 20, 2015), citing **Commonwealth v. Clark**, 28 A.3d 1284, 1288 (Pa. 2011) (emphasis omitted) (some internal quotations and citations omitted).

Instantly, the suppression court concluded that the affidavit of probable cause in support of the search warrant was fatally flawed because “there was insufficient indicia of reliability of the confidential informant and therefore there was not probable cause for the search of the home.” Suppression Court Opinion, 6/18/15 at 2. In so finding, the suppression court relied upon this Court’s decision in **Commonwealth v. Gindlesperger**, 706 A.2d 1216 (Pa. Super. 1997), *aff’d*, 743 A.2d 898 (Pa. 1999), in which we reiterated that a magistrate must consider the following four factors when determining the credibility of an unidentified informant and the reliability of his information: “(1) Did the informant give prior reliable information? (2) Was the informant’s story corroborated by another source? (3) Were the informant’s statements a declaration against interest? (4) Does the defendant’s reputation support the informant’s tip?” **Id.** at 1225. In **Gindlesperger**, we also noted that “[i]t is not necessary that the affidavit satisfy all four of these criteria.” **Id.**

Applying these four factors to the instant case, the suppression court concluded that

[t]here is no reference to the informant's previous reliability, the information provided by the informant was not corroborated by another source, and there is no information regarding the reputation of the informant. The simple statement that the informant was known to the Affiant and aware of potential consequences for providing false information, alone, does not satisfy the reliability requirements for obtaining a warrant based solely on information from a confidential informant.

* * *

For these reasons, we find that, based on the totality of the circumstances, the Affidavit of Probable Cause in support of the search warrant issued for the Defendant's home was fatally flawed and failed to include sufficient detail to justify the issuance of a search warrant.

Suppression Court Opinion, 6/18/15 at 3.

We find the suppression court's legal conclusions to be without error. The suppression court correctly concluded that the affidavit of probable cause in support of the search warrant established *none* of the criteria for evaluating the reliability of the information provided by an unnamed informant espoused in ***Gindlesperger***. There is no information contained in the affidavit that would support a finding that the informant's statements were a declaration against interest. Further, although the affiant attests that the informant was known to him, absolutely no information regarding the informant's past reliability is provided. Indeed, there is no basis to conclude that the unnamed informant has given any prior tips to the police, whether useful or not. Similarly, the affidavit contains no insight into the defendant's reputation that would support the informant's tip that Dignazio harbored stolen goods.

The Commonwealth maintains that the information regarding the stolen items located in Dignazio's apartment was corroborated by police information that these items had been reported stolen. Although this argument is facially compelling, we note that the police confirmed only that the items described by the informant had been reported stolen—not that they were located in Dignazio's apartment.² We also find it extremely troubling that the affidavit does not set forth the basis of the informant's knowledge that the items allegedly located in Dignazio's apartment were, in fact, stolen. **See Commonwealth v. Clark**, 28 A.3d 1284, 1288 (Pa. 2011) (“[A] determination of probable cause based upon information received from a confidential informant depends upon the informant's reliability *and basis of knowledge* viewed in a common sense, non-technical manner.”) (emphasis added). Further, there is no other corroborating information in the affidavit to confirm that “the informant has provided accurate information of criminal activity in the past, or [that] the informant himself participated in the criminal activity[.]” **Id.**

Simply put, there is nothing in the affidavit to substantiate the informant's allegation that stolen goods were present in Dignazio's home.

The Commonwealth counters that, although the informant remained anonymous, the identity of the informant was known to police, such that the

² As previously noted, the items described by the informant were not among those recovered during the search of Dignazio's home.

informant should be afforded a presumption of trustworthiness. The Commonwealth bases its argument on the Supreme Court's statement that "where an informant is not a paid, unknown tipster but instead an identified eyewitness to a crime who voluntarily reports his observations to the police, the trustworthiness of such a person may be presumed." **Commonwealth v. Weidenmoyer**, 539 A.2d 1291, 1295 (Pa. 1988) (citations omitted). Here, although known to police, the informant remained anonymous in the affidavit of probable cause, and thus cannot be considered an "identified eyewitness" afforded the presumption of trustworthiness. The four-part test in **Gindlesperger** applies specifically to "determining credibility of an *unidentified informant* and the reliability of his information[.]" **Gindlesperger**, 706 A.2d at 1225 (emphasis added). The informant in the instant case remains unidentified. We therefore find the presumption of trustworthiness in **Weidenmoyer** to be inapplicable.

Based upon the affidavit's failure to establish the reliability of the confidential informant, we find that there were insufficient facts to permit the issuing authority to conclude that there were stolen goods at the premises to be searched. We therefore agree that the information in the affidavit provided by the unidentified informant did not establish probable cause for the issuance of the search warrant.

Order affirmed.

J-S67030-15

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/2/2016