

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 19, 2016 Session

STATE OF TENNESSEE v. THOMAS BRADEN

**Direct Appeal from the Circuit Court for Maury County
No. 23892 Robert L. Jones, Judge**

No. M2015-00991-CCA-R3-CD – Filed July 27, 2016

The appellee, Thomas Braden, was indicted for possession of cocaine, possession of marijuana, and possession of Alprazolam, all misdemeanors. He filed a motion to suppress the evidence, arguing that the affidavit in support of the search warrant for the home in which the drugs were found was defective because it failed to establish ongoing criminal activity at the residence. The Maury County Circuit Court granted the motion, and the State now appeals. Upon review of the oral arguments, the record, and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Herbert H. Slatery III, Attorney General and Reporter; M. Todd Ridley, Assistant Attorney General; Brent Cooper, District Attorney General; and Patrick Powell, Assistant District Attorney General, for the appellant, State of Tennessee.

Lee E. Brooks, Spring Hill, Tennessee, for the appellee, Thomas Braden.

OPINION

I. Factual Background

On June 8, 2013, Investigator Jeff Seagroves of the Columbia Police Department submitted an affidavit in which he provided the following information in support of issuance of a search warrant:

John and/or Jane Doe . . . is/are in possession of the following described property, namely: Crack cocaine, crack cocaine paraphernalia, proceeds from the sale of crack cocaine. [T]o be searched for in accordance with the Laws of the State of Tennessee, upon the following described premises, namely[:]

509 White Street, Columbia, Tennessee 38401, being a single family dwelling. This residence's exterior is made of tan colored vinyl siding with white trim. The front door to the residence is metal and cream in color. This residence has a covered front porch with the number 509 clearly displayed on the front porch pillar just to the right of the front door. This warrant is to include any and all outbuildings, vehicles, and yard belonging to or under control of this location and/or John or Jane Doe. . . . [A]nd his/her reasons for such belief are that affiant has been contacted by a cooperating individual stating they could purchase crack cocaine from inside the residence located at 509 White Street, Columbia, Tennessee. The cooperating individual was met by this affiant and they were interviewed about them purchasing crack cocaine from this residence. The cooperating individual advised they could go to the residence, walk inside and purchase crack cocaine. The cooperating individual stated they know the people that live at the residence are selling crack cocaine.

The cooperating individual was searched for any narcotics, paraphernalia, or currency, with none being found. The cooperating individual was provided with an electronic listening device along with photo copied money to purchase the crack cocaine. Sgt. John Ussery, Lt. James Shannon and this affiant rode together monitoring the informant to an area near White Street. This affiant did watch the cooperating individual park [in front] of 509 White Street. This affiant heard, via electronic listening device, the cooperating individual, enter into the residence, and have a conversation with both a male and female subject. The conversation between the cooperating individual and the subjects was consistent with a drug transaction. The cooperating individual was then heard exiting the residence, and seen by this affiant leaving from the roadway [in front] of the residence located at 509 White Street. The cooperating

individual was met at a predetermined location where this affiant recovered the purchased product and electronic equipment. This affiant did field test the purchased product with Valtox and the field test did show the product to be positive for having a cocaine base.

A post buy interview with the cooperating individual was performed. The cooperating individual stated they went to the residence located at 509 White Street and after entering the residence they purchased crack cocaine from an unknown black male. The informant stated that after the purchase they left the residence and met this affiant. The cooperating individual was driven by and did point out and confirm that 509 White Street as the residence they purchased the crack from.

Due to this affiant's experience and training, it is known for people selling and storing drugs, to hide both narcotics, and proceeds from the sale of narcotics, in out buildings, yard, and vehicles in an attempt to keep police and others from finding it during the search of their homes.

The above facts did occur within . . . the last 72 hours.

Based on the information contained in the affidavit, a magistrate issued a search warrant. The warrant was executed on June 13, 2014, and the appellee was present during the search. In December 2014, the Maury County Grand Jury indicted the appellee for misdemeanor possession of cocaine, misdemeanor possession of marijuana, and misdemeanor possession of Alprazolam.

The appellee filed a motion to suppress the drugs found in the residence on the basis that the affidavit in support of the search warrant failed to establish ongoing criminal activity at the home and, therefore, failed to establish probable cause. In support of his argument, the appellee relied on State v. Archibald, 334 S.W.3d 212 (Tenn. Crim. App. 2010), and State v. Gregory Lamont Hall, M2013-02841-CCA-R3-CD, 2014 WL 4952989 (Tenn. Crim. App. at Nashville, Oct. 3, 2014).

At a hearing on the motion, the only evidence presented was the search warrant and the affidavit in question. Counsel for the appellee argued that the affidavit "lin[ed] up almost to the letter as far as language" with the affidavits in Archibald and Hall in which this court found that the affidavits were defective. Counsel also argued that the

affidavit failed to establish the cooperating individual's basis of knowledge and veracity. The State argued that unlike the affidavits in Hall and Archibald, the affidavit in this case was not "bare-bones" in that Investigator Seagroves stated that the cooperating individual knew the residents of the home to be selling crack cocaine, that multiple individuals were heard on the listening device during the transaction, and that the officer conducted a post-buy interview with the cooperating individual. Defense counsel responded, "We have a one-time sale. And no evidence at all about the person who made the sale as far as whether or not he lives there or whether he's a visitor there on his way out the door."

In a written order, the court found that the affidavit "provide[d] the nexus between criminal activity and the target house." Nevertheless, the court concluded that the affidavit failed to establish probable cause for issuance of the search warrant because the affidavit failed to show "that the cocaine was obtained from a known person regularly in the house or that any other cocaine remained in the house when the warrant was sought." The court stated that it was unable to distinguish this case from Archibald and Hall and, therefore, that it was obligated to grant the appellee's motion to suppress. Given that the State's case consisted of the drugs found during the search, the court also dismissed the indictment.

II. Analysis

The State contends that the trial court erred by granting the motion to suppress because the court improperly concluded that the affidavit failed to show evidence of ongoing drug activity at the house. The State contends that the court applied Archibald and Hall "too broadly" and that the affidavit demonstrates the existence of ongoing activity at the home. In the alternative, the State argues that if this court concludes that the trial court properly applied Archibald, then we should overrule or modify that decision. The appellee claims that the trial court properly granted his motion. We agree with the State that the affidavit in this case is distinguishable from those in Archibald and Hall. Nevertheless, we conclude that the trial court properly granted the motion to suppress.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review both questions of law and the trial court's application of law to the facts purely de novo. See State v. Hanning, 296 S.W.3d 44, 48 (Tenn. 2009); State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate

view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence.” Odom, 928 S.W.2d at 23.

Our supreme court has explained that

[t]he Fourth Amendment to the United States Constitution requires that search warrants issue only “upon probable cause, supported by Oath or affirmation.” Article I, Section 7 of the Tennessee Constitution precludes the issuance of warrants except upon “evidence of the fact committed.” Therefore, under both the federal and state constitutions, no warrant is to be issued except upon probable cause. Probable cause has been defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act.

State v. Henning, 975 S.W.2d 290, 294 (Tenn. 1998) (footnote and citations omitted). In this state, “a finding of probable cause supporting issuance of a search warrant must be based upon evidence included in a written and sworn affidavit.” Id. In order to establish probable cause, the affidavit “must show a nexus among the criminal activity, the place to be searched, and the items to be seized.” State v. Saine, 297 S.W.3d 199, 206 (Tenn. 2009) (citing State v. Reid, 91 S.W.3d 247, 273 (Tenn. 2002)). To determine whether the nexus has been sufficiently established, we should “consider whether the criminal activity under investigation was an isolated event or a protracted pattern of conduct[,] . . . the nature of the property sought, the normal inferences as to where a criminal would hide the evidence, and the perpetrator’s opportunity to dispose of incriminating evidence.” Saine, 297 S.W.3d at 206 (quoting Reid, 91 S.W.3d at 275). We note that “affidavits must be looked at and read in a commonsense and practical manner’, and . . . the finding of probable cause by the issuing magistrate is entitled to great deference.” State v. Bryan, 769 S.W.2d 208, 211 (Tenn. 1989) (quoting State v. Melson, 638 S.W.2d 342, 357 (Tenn. 1982)).

In Archibald, the affidavit submitted in support of issuance of the search warrant described a one-time purchase of narcotics by a confidential informant (CI) from someone in an apartment. See 334 S.W.3d at 213-14. In determining whether the trial court properly granted the defendant’s motion to suppress evidence, this court described the issue as “whether an affidavit alleging only that drugs were bought in a particular apartment up to seventy-two hours beforehand can support a warrant for the search of that apartment and its occupants.” 334 S.W.3d at 215. This court went on to conclude that although the affidavit contained information establishing a nexus between the defendant’s apartment and the criminal activity, it did not contain any information to establish how long that nexus would persist. Id. For example,

[i]t did not . . . contain any facts supporting an inference that the person who sold drugs to the CI was more than a one-time visitor to the apartment. Likewise, it did not establish that the CI observed any drugs other than the drugs he bought. Under these circumstances, we must conclude that the information in the affidavit became stale as soon as enough time had passed for such a one-time seller to leave the apartment.

Id. at 215-16. The court noted, though, that the affidavit would have established probable cause if it had contained reliable information from the CI to show ongoing criminal activity. Id. at 216.

Like Archibald, the affidavit in Hall “only described the CI entering the apartment and then ‘momentarily’ exiting the apartment after making a controlled buy.” Gregory Lamont Hall, M2013-02841-CCA-R3-CD, 2014 WL 4952989, at *4. As this court explained,

The affidavit did not reveal the quantity of drugs received, the identity of the seller, the identity of the target location’s residents, or whether the seller was a resident of the target location. Likewise, the affidavit did not establish that the seller “was more than a one-time visitor to the apartment” or that the CI observed other drugs inside the residence. Archibald, 334 S.W.3d at 215.

Id. In Hall, the State tried to distinguish the affidavit from that in Archibald by arguing that the affidavit reliably established ongoing criminal activity at the target residence. Id. Specifically, the affidavit in Hall stated at the beginning of the affidavit that it “was based upon either the ‘affiant’s personal knowledge, upon information received from other law enforcement officers, or upon information obtained from other sources as noted’ and [the affiant’s] statement that he had ‘received information that illegal narcotics were being sold at’ the target residence.” Id. However, this court rejected the State’s argument, concluding that the affiant police officer’s statement that drugs were being sold at the residence was merely a conclusory allegation and could not reliably establish ongoing criminal activity at the home. Id.

Comment [P1]:

Like Archibald and Hall, the affidavit in the instant case involved the one-time sale of narcotics. However, we agree with the State that the affidavit here is distinguishable from those in the previous cases. First, unlike the affidavit in Archibald, the affidavit in this case attempted to establish ongoing criminal activity by stating that

the cooperating individual knew the people living in the home were selling crack cocaine. Moreover, unlike the affidavit in Hall, said statement was made to show that the cooperating individual had personal knowledge of the ongoing criminal activity, and therefore, was more than a mere conclusory allegation by the affiant.

The State contended at oral argument that the cooperating individual's personal knowledge of the ongoing criminal activity at the target residence, combined with law enforcement's "extra step" of sending the cooperating individual into the home to confirm the cooperating individual's claim, took the need to establish the informant's basis of knowledge and veracity "out of the equation." However, the State's argument disregards State v. Jacumin, 778 S.W.2d 430, 432 (Tenn. 1989), in which our supreme court espoused the two-pronged Aguilar-Spinelli test "as the standard by which probable cause will be measured to see if the issuance of a search warrant is proper under Article I, Section 7 of the Tennessee Constitution." 778 S.W.2d at 436; see Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).¹ Specifically, "hearsay information supplied by a confidential informant can not support a finding of probable cause unless it also contains factual information concerning the informant's basis of knowledge and credibility." Henning, 975 S.W.2d at 294-95 (citing Jacumin, 778 S.W.2d at 432, 436). We note that the two-pronged Aguillar-Spinelli test is required if the hearsay information is being supplied by a criminal informant or a person from a "criminal milieu." State v. Smotherman, 201 S.W.3d 657, 662 (Tenn. 2006). The trial court in this case never addressed whether the cooperating individual was a criminal informant. However, defense counsel raised Jacumin and Aguillar-Spinelli at the suppression hearing, and the State did not dispute at the hearing and does not dispute on appeal that the cooperating individual was a criminal informant. See Tenn. R. App. P. 36(a).

The affidavit in the present case failed to provide any basis of knowledge and veracity for the cooperating individual's claim that the residents were conducting ongoing drug sales from the home and, therefore, is not reliable. Thus, as in Archibald, we conclude that the affidavit failed to show how long the nexus between the drug dealing and the residence would exist. Accordingly, the affidavit failed to establish probable cause for issuance of the search warrant.

The State contends that we should modify or overrule Archibald. In support of its argument, the State notes that "the Sixth Circuit, considering the same Defendant and

¹ We note that the Tennessee Supreme Court is presently considering whether Jacumin will remain valid in this state. See State v. Jerry Lewis Tuttle, No. M2014-00566-SC-R11-CD (Tenn. Feb. 18, 2016) (order) (granting State's application for permission to appeal and directing parties to brief "whether this Court should revisit the continuing validity of [Jacumin]"). However, as of this writing, the supreme court has not yet heard arguments in Jerry Lewis Tuttle.

warrant as this court in State v. Archibald, concluded that the warrant was supported by probable cause. . . . Specifically, the Court concluded ‘that a single controlled purchase is sufficient to establish probable cause to believe that drugs are present at the purchase location.’” United States v. Archibald, 685 F.3d 553, 558 (6th Cir. 2012). However, our supreme court has long held that while “‘article I, section 7 is identical in intent and purpose with the Fourth Amendment’” and, therefore, that “‘federal cases applying the Fourth Amendment should be regarded as ‘particularly persuasive,’” article I, section 7 may afford citizens of this state even greater protection. State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (quoting Sneed v. State, 423 S.W.2d 857, 860 (1968) and citing State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989) and Miller v. State, 584 S.W.2d 758 (Tenn. 1979)). Moreover, Archibald is a published opinion and, therefore, controlling authority. See Tenn. Sup. Ct. R. 4(G)(2). Thus, if our supreme court desires to modify or overrule Archibald, it can grant certiorari in the instant case.

III. Conclusion

Based upon the oral arguments, the record, and the parties’ briefs, we conclude that the trial court properly granted the appellee’s motion to suppress. Hence, the appellant is not entitled to relief.

NORMA MCGEE OGLE, JUDGE