

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-000687-MR

CHARLES L. PORTER AND  
SAMUEL PORTER

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 99-CR-002170

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Charles Porter and Samuel Porter appeal jointly from a judgment entered on a conditional plea of guilty to criminal charges relating to an alleged incident of drug trafficking in Louisville, Kentucky. The Porters argue on appeal that the search warrant that led to their arrest was based on information that the officers who sought the warrant knew to be false. We affirm.

The Porters' statement of facts is convoluted, but can be summarized as follows. A confidential informant, Barbara Reed, told Detective D. E. Spurgeon that several people were

shoplifting to support their drug habits, and trading the items to Charles Porter in exchange for drugs. One person, Antoinette Stith was receiving Dilaudid from Charles Porter in exchange for stolen items from three others, Raymond Stith, Michael Wooldridge, and Steve Booth. In order to obtain a search warrant, Detective Spurgeon set up a controlled buy through Reed, monitored through the use of a wire, during which Reed obtained one Dilaudid pill through Antoinette Stith, who obtained the pill from Charles Porter. While other policemen followed Charles Porter back to his residence, Detective Spurgeon accompanied Reed back to her residence, removed the wire, and obtained the pill. The Porters argue that the controlled buy never happened, and that the information is fabricated. However, Spurgeon signed an affidavit on July 22, 1999, to obtain a search warrant for the Porters' home. The warrant was issued and executed that day. The search revealed a large amount of cash, some white pills, scales, a quantity of crack cocaine and two guns. The Porters were arrested and charged with trafficking in a controlled substance and possession of drug paraphernalia; Charles Porter was also charged with possession of a handgun by a convicted felon, and later additional counts of possession of a firearm by a convicted felon and being a persistent felony offender in the second degree were added.

The Porters filed motions seeking the suppression of the evidence obtained by the execution of the search warrant, arguing that the search warrant was based on false evidence. The circuit court found that there was no basis for suppression of the evidence, holding that there was sufficient probable cause for the search and that a controlled buy did take place, which was sufficient basis for the warrant. The Porters then entered conditional guilty pleas as described above, and this appeal followed.

The Porters argue on appeal that they proved by a preponderance of the evidence that the information contained in the affidavit for the search warrant was false. We confine our review to whether the circuit court clearly erred, and note that the circuit court's findings are conclusive if supported by substantial evidence. Clark v. Commonwealth, Ky. App., 868 S.W.2d 101 (1993).

The applicable standard is found in Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984), which requires that the "totality of the circumstances" be considered when reviewing the sufficiency of a search warrant. The issuing court must determine whether 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, 238-39; 103 S.Ct. 2317, 2332; 76 L.Ed.2d 527,548 (1983). The information in the affidavit

must establish a substantial basis for concluding that the contraband or evidence described will be found in the place to be searched. Commonwealth v. Hubble, Ky. App., 730 S.W.2d 532 (1987).

We conclude that there was substantial evidence to support the circuit court's decision, and therefore regard its findings as conclusive. We perceive no clear error in the court's denial of the Porters' motion to suppress.

We likewise conclude that the Porters were not entitled to a hearing under Franks v. Delaware, 438 U.S. 154; 98 S.Ct. 2674; 57 L.Ed.2d 667 (1978). As that case states,

There is of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, **the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.** They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of affiant, not of any non-governmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged

falsity or reckless disregard is set to one side, **there remains sufficient content in the warrant affidavit to support a finding of probable cause**, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Id. at 171 (emphasis added).

We disagree that the Porters carried their burden with respect to demonstrating deliberate falsity or reckless disregard. The Porters failed to make the requisite showing for a hearing pursuant to Franks. The court's ruling was correct, and will not be disturbed on appeal.

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

ALL CONCUR.

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