

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000340-MR

DANNY R. HARRIS

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NOS. 00-CR-00089, 99-CR-00112,  
AND 99-CR-00112-0

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND McANULTY, JUDGES.

BUCKINGHAM, JUDGE: Danny R. Harris appeals from a judgment of the Floyd Circuit Court wherein he was convicted of first-degree possession of a controlled substance (cocaine), possession of drug paraphernalia, and being a second-degree persistent felony offender (PFO II). We affirm.

On October 27, 1999, a confidential informant related to Lieutenant Ricky Thornsberry of the Floyd County Sheriff's Department that he had seen cocaine in Harris's residence. Because Lieutenant Thornsberry had not had any prior dealings

with the confidential informant, he attempted to obtain other information to corroborate the information he had received. After talking with several individuals, Lieutenant Thornsberry received information from a second confidential informant who advised him that he had also observed cocaine in the Harris residence. On the following day Lieutenant Thornsberry prepared an affidavit for a search warrant containing the information from the two confidential informants. Thereafter, Lieutenant Thornsberry presented the affidavit to a district judge and obtained a search warrant for the Harris residence.

Shortly after 6:00 a.m. on October 29, 1999, the law enforcement officers arrived at the Harris residence to execute the search warrant. Upon entering the residence, they encountered a man and a woman in the living room. In addition, Harris was located coming out of one of the three bedrooms in the residence.

During the search of the residence, the officers discovered numerous items of contraband, including a large quantity of marijuana, items containing cocaine residue, and drug paraphernalia. While Lieutenant Thornsberry was interrogating the woman concerning her involvement with the drugs, Harris, who had not been advised of his constitutional rights, interjected that the drugs were his.

Harris was subsequently indicted on various offenses, and he was convicted after a jury trial of the offenses of first-degree possession of a controlled substance (cocaine) and possession of drug paraphernalia.<sup>1</sup> Pursuant to a plea agreement with the Commonwealth, he then pled guilty to PFO II. He was sentenced to five years for the cocaine possession charge, and the sentence was enhanced to ten years due to the PFO II offense. Harris was also sentenced to twelve months in the county jail for the charge of possession of drug paraphernalia, and that sentence was ordered to run concurrently with the ten-year sentence on the other charge. In accordance with the plea agreement, a separate pending indictment against Harris was dismissed as were pending charges against him for which an indictment had not yet been obtained. Harris then appealed.

Harris's first argument is that the affidavit in support of the search warrant was insufficient to support a finding of probable cause for the issuance of a search warrant. Specifically, he asserts that the affidavit did not contain sufficient specificity or detail, did not reference the time when the cocaine was observed in the residence, and contained insufficient reliable evidence from the confidential informants.

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<sup>1</sup> Harris was found not guilty of trafficking in marijuana.

Further, Harris maintains that the good faith exception to the search warrant requirement was not applicable.

As we have noted, both confidential informants stated that they had seen cocaine in Harris's residence. During the preliminary hearing, Lieutenant Thornsberry testified that he was told by the first confidential informant that he had seen cocaine in the residence "within a few days" of when the information was received. Lieutenant Thornsberry also testified that he did not know when the second confidential informant observed the cocaine.

Kentucky courts have adopted the "totality of the circumstances" test for determining whether an informant's tip suffices to establish probable cause for the issuance of a search warrant. Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 915 (1984). In the case *sub judice*, Lieutenant Thornsberry received information from a confidential informant that the informant had seen cocaine in the Harris residence within a few days prior to relating the information. Since Lieutenant Thornsberry did not have sufficient information as to the reliability of that confidential informant, he sought evidence to corroborate the information given. He eventually located a second confidential informant who had proven to be reliable in the past. We conclude this information was sufficient to corroborate the information from the first confidential

informant and satisfies the "totality of the circumstances" test. Although Harris argues that additional corroborative evidence was needed to support a finding of probable cause, we believe the best corroborative evidence that cocaine was in the residence was information from another person who had also seen cocaine in the residence.

We turn now to the second part of Harris's first argument, that the affidavit was insufficient to support a finding of probable cause because it did not state when the cocaine was observed in the residence. We agree with Harris that the affidavit was deficient in that it did not contain any reference to time and did not indicate whether or not the information was stale. However, we agree with the Commonwealth that the good faith exception to the exclusionary rule was applicable. See Crayton v. Commonwealth, Ky., 846 S.W.2d 684 (1992).

The facts in this regard are much like the facts in Commonwealth v. Litke, Ky., 873 S.W.2d 198 (1994), and Commonwealth v. Opell, Ky. App., 3 S.W.3d 747 (1999). In those cases the appellate courts held that the good faith exception applied where the information was not stale but where the time specificity had not been inserted into the affidavit. Litke, 873 S.W.2d at 199; Opell, 3 S.W.3d at 752. Likewise, in this

case the information given by the first confidential informant to Lieutenant Thornsberry was not stale.

Harris's second argument is that the trial court erred in not requiring the Commonwealth to reveal the identity of the confidential informant or, at a minimum, in not conducting an in camera review of the informants' identities and the reasons why the Commonwealth did not want to reveal their identities. KRE<sup>2</sup> 508(a) gives the Commonwealth a privilege to refuse to disclose the identity of confidential informants. Exceptions to the general rule of privilege are set forth in KRE 508(c). The only possible exception in this case would relate to whether the confidential informants could give relevant testimony. As the confidential informants in this case were not material witnesses to the crimes charged but were only tipsters, the court properly refused to require the Commonwealth to reveal their identities. See Thompkins v. Commonwealth, Ky., 54 S.W.3d 147 (2001); Taylor v. Commonwealth, Ky., 987 S.W.2d 302 (1998). Furthermore, concerning the appropriateness of an in camera review of the confidential informants by the court, Harris did not request such a review and is now precluded from raising that issue on appeal. See RCr<sup>3</sup> 9.22.

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<sup>2</sup> Kentucky Rules of Evidence.

<sup>3</sup> Kentucky Rules of Criminal Procedure.

Harris's third argument is that the trial court erred by failing to conduct an evidentiary hearing as required by RCr 9.78 to determine whether his statement that the drugs were his should have been suppressed. At the beginning of the trial, Harris's attorney sought to have the court declare the statement inadmissible. He presented a transcript of Lieutenant Thornsberry's testimony at the preliminary hearing. The matter was discussed between the court and counsel, and the court ruled that the statement was admissible because Harris was not being interrogated when he made the statement.

We conclude that Harris's arguments in this regard are without merit. First, a hearing was held on the suppression motion as required by RCr 9.78. Second, the trial court made adequate findings concerning the statement which were supported by substantial evidence and are thus conclusive. See RCr 9.78.

Harris's last argument is that the trial court erred in refusing to allow him to withdraw his guilty plea or, at a minimum, to conduct an evidentiary hearing on the matter. At the initial sentencing hearing, Harris fired his attorney. At the subsequent sentencing hearing, Harris's new attorney advised the court that Harris desired to withdraw his guilty plea because his first attorney lied to him and because he was under the influence of drugs when he entered his PFO II guilty plea.

After hearing the Commonwealth's response to the motion, the court extensively reviewed the plea colloquy and gave sufficient reasons for denying Harris's motion. We conclude the record shows that a hearing was held and that the court did not err in refusing to allow Harris to withdraw his guilty plea prior to sentencing. Such was within the trial court's discretion. See RCr 8.10 and Anderson v. Commonwealth, Ky., 507 S.W.2d 187, 188 (1974).

The judgment of the Floyd Circuit Court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING: Respectfully, I dissent.

I do not believe that the insufficient detail provided by the collaborating informant salvaged the insufficient detail provided by the initial informant. The "totality of the circumstances" test adopted by our Supreme Court in Taylor v. Commonwealth, Ky., 987 S.W.2d 302 (1999) did not dispense with the fundamental requirement that specific information be provided by the informant. The paucity of information provided by both informants coupled with the absence of investigation, in my opinion do not support a finding of probable cause as required by both the U.S. and Kentucky Constitutions.

Therefore, I would vacate the judgment of the trial court and remand for a new trial.

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