

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001104-MR

NIKLAAS SEKOU KARENGA

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
INDICTMENT NO. 02-CR-00201

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, Chief Judge; BAKER and HUDDLESTON, Judges.

HUDDLESTON, Judge: Niklaas Karenga appeals from a Fayette Circuit Court judgment and sentence of imprisonment predicated on his conditional plea of guilty to trafficking in a controlled substance, first degree, and possession of drug paraphernalia, second degree.¹ Karenga was sentenced to five years in prison on

¹ The third count that Karenga was initially charged with, giving an officer a false name, was dismissed.

the first count and one year on the latter count, to be served consecutively.

In January 2002, Detective Keith Ford was working in the Narcotics Enforcement Unit of the Lexington Police Department. According to Ford, the unit had received several complaints concerning the sale of crack cocaine at 734 North Broadway, apartment #1, Karenga's residence, prior to the incident that led to Karenga's arrest. At approximately 10:00 p.m. on January 2, 2002, a confidential informant advised the unit that crack cocaine was being sold at that address. Upon receiving this information, Ford met with the informant for the purpose of coordinating a controlled purchase of crack cocaine. Two such purchases ensued, with the informant purchasing crack cocaine from "Nick," the subject who lived at the aforementioned address, on each occasion; Ford was involved in one of these transactions. Although the present case was admittedly the first time Ford had used the informant in question on a case he was in charge of processing, he had been involved in two other cases in which the informant proved reliable.

On January 3, 2002, Ford prepared an affidavit in support of a search warrant for the premises in question that was issued by Fayette District Court and executed by Ford later that day. Upon arriving at Karenga's apartment, Ford secured Karenga, conducted a protective sweep, read the search warrant

aloud and advised Karenga of his rights pursuant to Miranda v. Arizona.² Because the search yielded evidence of trafficking, viz., two crack pipes, twisted baggies, a filter, a plastic bag containing smaller plastic bags of crack and \$35.00 in cash, Ford arrested Karenga.³

Pursuant to Kentucky Rules of Criminal Procedure (RCr) 9.78,⁴ Karenga filed a motion to suppress the evidence that resulted in his arrest alleging that:

[T]he physical evidence in this case was obtained through an illegal search of [Karenga's] residence and his person based on an inadequate search warrant affidavit, including but not limited to an insufficient identification of [Karenga] by a

² 384 U.S. 436, 865 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

³ Ford also testified that Karenga had two outstanding arrest warrants, one for criminal trespass and the other for nonpayment of fines.

⁴ Ky. R. Crim. Proc. (RCr) 9.78 provides:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

confidential informant, in violation of the Fourth Amendment to the United States Constitution, Section 10 of the Kentucky Constitution and applicable case law. Further, any and all statements by [Karenga] were obtained following the above described search and are in violation of the Fifth Amendment to the United States Constitution, Section 11 of the Kentucky Constitution and applicable case law. Further, any statements by [Karenga] made following the illegal search are inadmissible as fruit of the poisonous tree.

At the suppression hearing, the Commonwealth relied solely upon the testimony of Ford that was consistent with the foregoing summary of events. In support of his motion, Karenga argued that the Commonwealth should be required to establish how the informant acquired the information that led police to his residence because, absent verification, there is no system of checks and balances to preclude the police from falsely claiming that an informant exists. Disputing this assertion, the Commonwealth emphasized that neither the controlled purchase nor the information that precipitated the purchase should be the focus of this case since the arrest of Karenga resulted from the execution of a valid search warrant.

In a March 18, 2002, order, the court denied Karenga's motion to suppress, finding that the Commonwealth did not have to provide the information regarding the informant's basis of knowledge because there was a substantial likelihood that such a revelation would result in the informant's identity being exposed. Further, the court found that the search of Karenga's residence and his subsequent arrest were constitutionally valid and, therefore, both the evidence seized during the search and Karenga's statements were admissible. Following the court's unfavorable ruling, Karenga entered a guilty plea to the first two counts of the indictment, reserving his right to appeal the court's denial of his motion to suppress the incriminating evidence.

On appeal, Karenga's arguments mirror those he made below. Further, he contends that "there is serious doubt as to the existence of the informant" in this case since Ford could not explain how the informant obtained the information at issue and the affidavit prepared by Ford did not accurately identify the suspect [Karenga]. In Karenga's view, the court abused its discretion in failing to conduct a hearing to determine the totality of the circumstances surrounding the issuance of the search warrant in question since Ford's testimony standing alone does not constitute substantial evidence to support the court's findings. Because there was no "direct evidence regarding the

reliability of the informant" and there is "serious doubt" as to his existence, Karenga urges us to "remand this case for further proceedings, including but not limited to" such a hearing so as "to determine that an informant truly existed in this case."

In response, the Commonwealth argues that the court acted properly in denying Karenga's motion to suppress because the informant's tip as corroborated by Ford's independent investigation and documented in his affidavit constituted probable cause to support the warrant. According to the Commonwealth, the basis of the informant's knowledge is "just one relevant factor to be considered in the totality of the circumstances analysis" so the lack of information in this regard "does not operate [to] bar the finding of probable cause" and the record refutes the "absurd argument" that there is serious doubt as to the existence of the informant.

Pursuant to RCr 9.78, in the context of a suppression hearing, "[i]f supported by substantial evidence the factual findings of the trial court shall be conclusive." Further, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."⁵ Substantial evidence

⁵ RCr 9.78, *supra*, n. 4; Ky. R. Civ. Proc. (CR) 52.01, which is applicable in criminal proceedings by virtue of RCr 13.04.

is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men."⁶

In Beemer v. Commonwealth,⁷ the Kentucky Supreme Court removed any doubt as to the applicable standard of review in cases where the defendant questions the validity of the warrant because the supporting affidavit does not establish the credibility of the informant, as is the case here, explicitly adopting the "totality of the circumstances" test set forth by the United States Supreme Court in Illinois v. Gates,⁸ cited by both parties.

[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts."⁹ "A grudging or negative attitude by reviewing courts toward warrants,"¹⁰ is inconsistent with the Fourth

⁶ Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998)(citations omitted).

⁷ Ky., 665 S.W.2d 912 (1984).

⁸ 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

⁹ Spinelli v. United States, 393 U.S. 410, 419, 89 S. Ct. 584, 590, 21 L. Ed. 2d 637 (1969).

¹⁰ United States v. Ventresca, 380 U.S. 102, 108, 85 S. Ct. 741, 745, 13 L. Ed. 2d 684, 685 (1965).

Amendment's strong preference for searches conducted pursuant to a warrant" ¹¹

"Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a 'substantial basis for . . . concluding' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." ¹²

Departing from precedent, the Kentucky Supreme Court found that "reaffirmation of this standard better serves the purpose of encouraging recourse to the warrant procedure and is more consistent with our traditional deference to the probable cause determinations of magistrates than is the 'two-pronged test'" ¹³ of Aguilar v. Texas ¹⁴ and Spinelli. In so doing, the

¹¹ Beemer, supra, n. 7, at 914.

¹² Id., quoting Jones v. United States, 362 U.S. 257, 271, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697, 708 (1960).

¹³ Id. at 914. The two-pronged test abandoned by the United States Supreme Court in Gates and the Kentucky Supreme Court in Beemer, consists of the following: "(1) that the basis of the knowledge of the informant be shown, and (2) that the reliability of the informant must be established." Id.

¹⁴ 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

Court was "fully in accord with the relaxation of the Federal requirements as expressed in [Gates]." ¹⁵

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and the "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from Aguilar v. Spinelli. ¹⁶

Applying these principles to the instant case, our analysis necessarily begins with a review of the affidavit at

¹⁵ Beemer, supra, n. 7, at 915.

¹⁶ Id. at 914-915, quoting Gates, supra, n. 8, 462 U.S. at 238, 76 L. Ed. 2d at 548 (citation omitted).

issue, the relevant content of which, as sworn to by Ford, is as follows:

. . . of the premises known and numbered as:

734 N. Broadway, Apartment #1, Lexington, Fayette County, Kentucky

* * *

and more particularly described as follows:

734 N. Broadway, Lexington, Fayette County, Kentucky is a two story, multi-unit apartment building situated on the east side N. Broadway and faces west between W. Seventh Street and Spence Alley. 734 N. Broadway is situated further back from the street in relation to other buildings/houses on the same side of the block. 734 N. Broadway is constructed of cinder block/brick and is painted yellow and white in color. The numerals "734" are painted on the upper right side of the building when viewed from N. Broadway. The apartment to be searched is Apartment #1. Apartment #1 is located on the ground floor of the building and is the first apartment one would come to if approaching from the front of the building. The numeral "1" is posted on the door of the apartment.

* * *

and/or on the person(s) of:

Unknown Black Male subject, 5/5"-5'7" in height, 220 lbs.-240 lbs. in weight, and appears to be in his late 30's in age.

* * *

for the following described personal property, to wit: Cocaine, notes, letters, writings, photos, monies, recordings, safes, weapons, paraphernalia, or whatever drug the presence of which might tend to indicate the illegal use of, possession of, or trafficking in a controlled substance as defined by the Uniformed Narcotics Act of 1982.

* * *

On the 2nd day of January, 2002, at approximately 2200 am/pm, affiant received information from/observed:

A qualified confidential informant advised that he/she knew that crack cocaine was being sold from 734 N. Broadway, Apartment #1.

On January 3, 2002, the affiant met with the same qualified confidential informant for the purpose of making a controlled purchase of crack cocaine from 734 N. Broadway #1. Within the past 48 hours of application for this search warrant, the affiant supervised the same qualified confidential informant for the purpose of making a controlled purchase of

crack cocaine from 734 N. Broadway #1. The qualified confidential informant was able to conduct a controlled purchase of crack cocaine from 734 N. Broadway #1 while being supervised by police detective(s).

The qualified confidential informant who provides the information contained in this affidavit has provided information to the narcotics unit on multiple occasions. The informant has also purchased narcotics for this unit on at least three occasions in the past. The informant has demonstrated truthfulness and accuracy and the information provided has been verified via independent investigation.

EXIGENT CIRCUMSTANCES

The amount of crack cocaine that is believed to be sold from this location is of such size that it would be easily destroyed or disposed of without immediate entry.

Acting on the information received, affiant conducted the following independent investigation:

Within the past 48 hours the affiant met with a qualified confidential informant for the purpose of making a controlled purchase of crack cocaine from 734

N. Broadway #1. The affiant searched and then provided police buy money to the informant. The affiant then escorted the informant to the location and narcotics detectives observed the informant go to and enter 734 N. Broadway #1 (described apartment). After a few minutes, the informant returned to the affiant (all the while being observed by detectives) with a quantity of crack cocaine. The informant was once again searched by the affiant. The informant released to the affiant a quantity of crack cocaine that the informant stated was purchased from the described subject within 734 N. Broadway #1. The crack cocaine field tested positive and was booked in at police headquarters.

Based on the information received and the investigation that followed, the affiant believes that evidence of narcotics use, possession, or trafficking will be found upon immediate search of 734 N. Broadway #1 (described apartment), Lexington, Fayette County, Kentucky.

As demonstrated by even a cursory review of Ford's affidavit, the informant, whose qualifications were attested to by Ford, identified Karenga, described his residence and

specified the alleged illegal activity being engaged in at that location in sufficient detail to warrant further investigation. Ford then corroborated this information via an independent investigation that substantiated the informant's tip, a crucial factor that is not contested by Karenga. Contrary to Karenga's assertion, Ford's failure to inquire as to the source of the informant's knowledge does not in and of itself render his affidavit inadequate to support a finding of probable cause. Likewise, the fact that Ford's testimony and affidavit differ somewhat with respect to his description of Karenga, i.e., Ford omitted the "Nick" reference from the affidavit and failed to specify that the suspect was an older black man with graying hair, does not necessarily "cast doubt on the reliability of the informant and the testimony of Ford." Neither of these alleged deficiencies are conclusive as to the dispositive inquiry as to whether the affidavit submitted by Ford in support of his application for a search warrant reflected a substantial basis for concluding that probable cause existed for the issuance of the warrant.

Decisions applying the totality of the circumstances analysis have "consistently recognized the value of corroboration of details of an informant's tip by independent

work."¹⁷ An affidavit relying on hearsay is "not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented."¹⁸ Even in making a warrantless arrest an officer is entitled to rely upon the tip of an informant rather than his own direct observations as long as the informant's statement is corroborated by other matters within the officer's knowledge.¹⁹ That being the case, a tip from an informant properly characterized as "qualified" that is subsequently verified by an independent police investigation, i.e., controlled crack cocaine purchase, during which the informant is closely monitored and necessary precautions are taken to ensure the integrity of the investigation, justifies a finding of probable cause. Such is the case here.

Acting on a tip from a "qualified confidential informant," Ford conducted an investigation within forty-eight hours that verified the "veracity" and "reliability" of the informant, thereby dispensing with the allegation that he failed to inquire as to the "validity, origin or reliability" of the information that prompted the investigation. Ford then prepared an affidavit attesting to both the tip and the investigation in

¹⁷ Gates, supra, n. 8, 462 U.S. at 241, 76 L. Ed. 2d at 550.

¹⁸ Id. (citation omitted).

¹⁹ Id.

order to obtain a search warrant for the subject premises and later offered testimony that the circuit court deemed credible confirming the entire process, albeit in greater detail. Under the "totality of the circumstances," a finding of probable cause was justified. In arguing that "this investigation and subsequent search [were] based entirely on the information provided by this unknown informant," Karenga merely highlights Ford's compliance with established protocol, undermining his own position in the process.

Even assuming arguendo that Karenga's assertion as to the anonymity of the informant was accurate, a characterization consistently disputed by Ford, the honesty and reliability of an anonymous informant become far less crucial following an independent investigation.²⁰ Although the rationale behind this thinking: "Because an informant is right about some things, he is more probably right about other facts," might not be the type of "reliability" or "veracity" necessary to satisfy the stricter standard of Spinelli, "it suffices for the practical, common-sense judgment called for in making a probable cause determination."²¹ By conducting an independent investigation that corroborated the informant's tip, Ford removed the

²⁰ Id., 462 U.S. at 244, 76 L. Ed. 2d at 552.

²¹ Id.

potential for a Fourth Amendment violation that would otherwise have existed, thereby providing a "substantial basis for crediting the hearsay" and establishing probable cause in a manner dictated by Gates. Accordingly, the search warrant was valid and the circuit court properly denied Karenga's motion to suppress the evidence seized upon its execution.

Given our resolution of the probable cause issue, the remaining question is whether Ford's testimony constitutes substantial evidence upon which the circuit court could properly rely in making this conclusive legal determination. No credible argument can be made that the testimony of the supervising detective [Ford] in an investigation undertaken to corroborate an informant's tip, if consistent with his affidavit and taken as true, as is the case here, does not suffice for that purpose. Karenga's argument in this vein amounts to an attack on Ford's credibility and, therefore, must fail. Resolving factual disputes and assessing the credibility of witnesses are functions uniquely within the province of the circuit court. Ford's testimony was consistent with his affidavit in every key respect. Giving "due regard" to the opportunity of the court to assess his credibility, we have neither the authority nor the inclination to disturb its decision.

In light of this determination, analysis of the related issue regarding suppression of the statements made by

Karenga is unnecessary. As correctly observed by the Commonwealth, an argument must be precisely identified and preserved in the lower court in order to be raised on appeal.²² Contrary to the Commonwealth's assertion, however, Karenga did preserve this argument below as evidenced by the cited excerpt from his "motion to suppress evidence."²³ Accordingly, Karenga would have been entitled to have this issue addressed on the merits had the preceding issues been decided in his favor.²⁴

To summarize, "[w]e think the totality of the circumstances, including the informant's tip and the subsequent surveillance and investigation by the police officers, established a substantial basis for a reasonable belief by the magistrate,"²⁵ that a search of the premises in question would reveal evidence "tend[ing] to indicate the illegal use of, possession of, or trafficking in a controlled substance." No more is required.

²² RCr 9.22; Powell v. Commonwealth, Ky. App., 843 S.W.2d 908, 909 (1992).

²³ In the opening paragraph of his motion, Karenga moved the court to "suppress any and all physical evidence and any and all oral, taped or written statements which may have been made by the defendant to members of law enforcement."

²⁴ Since Karenga was informed of his rights pursuant to Miranda, his statements would have been admissible.

²⁵ Beemer, supra, n. 7, at 915.

Consistent with the foregoing, the order denying Karenga's motion to suppress the evidence discovered during a valid search of his apartment is affirmed.

ALL CONCUR.

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