

RENDERED: MARCH 21, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001205-MR

GARY W. GREGG

APPELLANT

v. APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 01-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND HUDDLESTON, JUDGES.
BAKER, JUDGE. Gary Gregg brings this appeal from a February 28,
2002, judgment of the Pendleton County Circuit Court. We
reverse and remand.

The facts are these: On July 9, 2001, Chief Deputy
Craig Peoples of the Pendleton County Sheriff's Department
prepared and submitted an Affidavit for Search Warrant
(Affidavit) and a Search Warrant to the Pendleton County

District Court Judge, seeking to search property owned by Gary Gregg. The judge issued the search warrant, and the subsequent search uncovered numerous items of stolen property, items used in the manufacture of methamphetamine, and methamphetamine. On July 10, 2001, Peoples prepared and submitted a second Affidavit for Search Warrant and a Search Warrant to the Pendleton County District Court Judge. Peoples had received information on July 8 that other tools and equipment he had seen but had not seized on the Gregg property were stolen items. Peoples executed the warrant the same day he prepared and submitted it.

A Pendleton County grand jury indicted Gregg for manufacturing methamphetamine (KRS 218A.1432), first-degree possession of a controlled substance (KRS 218A.1415), first-degree trafficking in a controlled substance (KRS 218A.1412), and nine counts of receiving stolen property (KRS 514.110).

On November 1, 2001, Gregg filed a Motion to Suppress the results of both the search on July 9, 2001, and the search on July 10, 2001. As a result, he received an evidentiary hearing on December 6, 2001. On December 18, 2001, the circuit court denied his motion. On February 21, 2002, Gregg entered a conditional guilty plea, pursuant to a written plea bargain, to nine counts of receiving stolen property (K.R.S. 514.110) and one count of criminal attempt to manufacture methamphetamine (K.R.S. 506.010). The circuit court accepted his change of plea

on the same day, and on April 8, 2002, entered final judgment sentencing Gregg to eight years' imprisonment. This appeal follows:

Gregg asserts that the circuit court committed reversible error by denying his motion in limine to suppress the fruits of the July 9, 2001, search warrant. Gregg contends that the Affidavit underlying the Search Warrant contained false statements and omissions made knowingly and intentionally or with reckless disregard for the truth. To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause. Commonwealth v. Smith, Ky. App. 898 S.W.2d 496, 503 (1995). The same basic standard also applies when affidavits omit material facts. Id. Gregg posits that two statements made by Deputy Peoples were false statements made intentionally or recklessly, and a third statement lacked material facts necessary for determining probable cause.

First Alleged False Statement

Deputy Peoples stated in the Affidavit that on July 2, 2001, he "surveyed the property and observed people who are involved in trafficking [sic] and manufacturing of illegal drugs and are suspects in two local burglaries." (Affidavit for Search

Warrant at 2). During the evidentiary hearing Peoples testified that while he did see some persons on the property on July 2, the individuals referred to in the Affidavit language quoted above were all seen away from the Gregg Property. Deputy Peoples met these persons on a road about a half-mile from the Gregg property as he was driving away from the property, and as they were driving toward it. We interpret Peoples' statement in the affidavit as saying he saw these individuals on the Gregg property.

Gregg's assertion that this statement by Peoples was false and made with a reckless disregard for the truth is correct. A wide gap exists between an officer seeing persons on a piece of property and an officer seeing persons a half-mile from the property, especially when the persons are driving on a public road and there are a number of other places in the area or beyond that could be their ultimate destination. Thus, the language from the Affidavit "and observed people who are involved in trafficking [sic] and manufacturing of illegal drugs and are suspects in two local burglaries both involving the theft of lawnmowers, various types of hand tools both electric and non and over 15 firearms" must be purged. (Affidavit for Search Warrant at 2).

Second Alleged False Statement

Peoples stated in the Affidavit that "[o]n July 6, 2001 two persons who were seen going to and from the property were arrested and charged with the Cultivation of Marijuana and Possession of Marijuana." (Affidavit for Search Warrant at 2). The two persons alluded to were Josh Gregg and Stuart Stephens. Peoples testified at the evidentiary hearing that he saw Josh Gregg and Stephens in a car about a half-mile from the Gregg property headed in the direction of the Gregg property. Peoples also testified that he saw Josh Gregg about a half-hour earlier in Falmouth in the parking lot of a local liquor store.

Peoples saw Josh Gregg twice on July 2, 2001. Once in Falmouth about five miles from the Gregg property and then about thirty minutes later about one half-mile from the Gregg property, headed in its direction. This court cannot fathom how these two sightings authorize Peoples to state that he saw Josh Gregg and Stephens "going to and from the property." The statement was false and made with reckless disregard for the truth. Therefore, the following language from the Affidavit must be purged and may not be considered when determining if the Search Warrant contains probable cause to search the Gregg property: "On July 6, 2001 two persons who were seen going to and from property were arrested and charged with the Cultivation of Marijuana and Possession of Methamphetamine. One of the

persons seen going to and from the property was Josh Gregg who had use of the vehicle used in the recent Ralph Bonar Burglary." (Affidavit for Search Warrant at 2).

Alleged Material Omission

Peoples stated in the Affidavit that a man named "Popeye" advised Caudle that the methamphetamine was not available that day, but that he should "come back tomorrow." Peoples wrote in his police report of the Gregg investigation: "'Popeye' told informant not to come back to this location and to give him a telephone number to call him at tomorrow when the product was ready and he could pick it up." (Peoples Police Report at unnumbered page 1). Gregg argues that Peoples' statement in the affidavit constituted a material omission since the full language from the police report would lead the judge to conclude that no methamphetamine would be present on Gregg's property. We disagree.

The context of the exchange between "Popeye" and Caudle is Caudle's purchase of an "eight ball" of methamphetamine. Simply because Caudle was asked to meet "Popeye" somewhere else to consummate this exchange, it does not follow that the methamphetamine manufacturing equipment or the remainder of the methamphetamine would be removed from Gregg's property. Thus, this portion of the Affidavit may be retained and may be considered when determining probable cause.

We now move to the second prong of the Smith analysis. Even with the purging of the false statements from the Affidavit underlying the warrant, the warrant itself will not be voided unless the remaining language of the affidavit is insufficient to support a finding of probable cause. Smith, 898 S.W.2d at 503; see also United States v. Barone, 584 F.2d 118,120(6th Cir. 1978).

In determining probable cause, this court must examine the search warrant under the "totality of the circumstances" standard and determine if there is a substantial basis that the search warrant would uncover evidence of wrongdoing. Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 914 (1984). An affidavit for a search warrant based on information furnished by a named individual is ordinarily sufficient to support the warrant. Embry v. Commonwealth, Ky., 492 S.W.2d 929, 932 (1973). While on the Gregg property, the informant, Caudle, saw a substance believed to be methamphetamine contained in two five-gallon buckets. Additionally, he attempted to purchase methamphetamine from someone on the property, but was told that the methamphetamine was not ready to be sold at that time. On these facts alone, we hold that there was a substantial basis that the search warrant would uncover evidence of wrongdoing. Thus, looking at the "totality of the circumstances" contained in the

Affidavit incorporated by the Warrant, we determine that probable cause existed for a search.

Now, we turn to the appellant's argument that both the Affidavit and the Search Warrant fail to state with particularity the objects of the search in violation of U.S. Const. Amend. IV and KY. Const. Sec. 10. We must review the affidavit purged of the statements that have been determined to be false.

Items to be seized under a legally executed search warrant must be described "particularly" or "as nearly as may be" under the respective provisions of the U.S. Const. Amend. IV and the Ky. Const. Sec 10. See Wilson v. Commonwealth, Ky. 621 S.W.2d 894, 895 (1981). These provisions mean that a search warrant must contain such a description of a place, person, or thing to be searched or seized as will reasonably identify them. Johantgen v. Commonwealth, Ky. App., 571 S.W.2d 110, 111 (1978). Gregg first contends that neither the Affidavit for Search Warrant nor the Search Warrant contains a description of the property to be seized because the space provided for this information on the pre-printed forms is blank. While the law requires that items to be seized be described with "particularity" in an executed search warrant, it does not require those items to be listed in a certain enumerated section of the warrant.

The purpose of the particularity requirement is to avoid a "general, exploratory rummaging in a person's belongings." Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). Though the Affidavit leaves the pre-printed area provided for a list of items to be seized blank, we do not believe that such a narrow reading of the Fourth Amendment and section 10 of the Kentucky Constitution is required. The affiant does list some items in other places in the affidavit, and the Search Warrant incorporates the entire affidavit by reference. See United States v. Blackney, 942 F.2d 1001, 1024 (6th Cir. 1991)(holding a search warrant may be construed with reference to a supporting affidavit if the affidavit accompanies the warrant and the warrant incorporates the affidavit by reference). Thus, the warrant is not invalid because the items to be seized were not listed in the pre-printed area of the Search Warrant or Affidavit forms.

We now turn to examine if the items to be seized in the warrant are described in a way that will reasonably identify them. Johntagen, 571 S.W.2d at 111. As noted above, the Warrant incorporates the whole of the Affidavit. Affidavits must be tested and interpreted in a commonsense and realistic fashion. A court, in determining whether an affidavit is sufficient to require issuance of a search warrant, must consider whether the items sought are sufficiently described so

that its exercise of judgment in respect to the items seized may not be deemed to be arbitrary. United States v. Seta, 669 F.2d 400, 402-03 (6th Cir. 1982). We must examine the relevant descriptions in the Affidavit, after the false information has been purged.

The Affidavit describes two five-gallon tubs covered with stockings containing a substance believed to be methamphetamine. The Affidavit prominently includes the informant's description of the tubs and his attempt to purchase methamphetamine. These items are sufficiently described so that the district judge's exercise of authority is not arbitrary. Id. Thus, items relating to the manufacture of methamphetamine were properly seized by the officers.

Second, we examine the informant's observation of "a large speed boat, a large amount [sic] of firearms stacked along the wall, and many other items tools, lawnmowers, etc." On its face, these items seem particularly described as items to be seized. However, in his testimony at the evidentiary hearing, the affiant, Deputy Peoples, stated that he had no reason to believe that the speedboat was stolen property. Considering this statement, we must conclude that the speed boat and other items in this list were not meant to constitute a list of stolen property to be seized but simply set forth what the informant observed on the property.

Finally, we examine the clause in the Affidavit that reads: "other items fitting the description taken from the burglary were observed on the property by Caudle." This description does not reasonably identify any items to be seized. Without the purged portion of that sentence, a reasonable person would not know what burglary the clause referenced. Thus, we hold that the items relating to the manufacture of methamphetamine were sufficiently described to warrant their seizure, but the items concerning the burglaries were not sufficiently described to warrant seizure.

However, the warrant's failure to particularly describe the items from the burglaries does not necessitate the suppression of all or any of the burglary items seized if the officers seized the items under the plain view doctrine. "While engaged in a legitimate search under a search warrant describing specific articles, it is proper to seize stolen or contraband property . . . though the items are not described in the warrant." Basham v. Commonwealth, Ky., 675 S.W.2d 376, 383 (1984) (quoting Jones v. Commonwealth, Ky., 416 S.W.2d 342, 343 (1967)).

Several elements must exist for this exception to be allowed. First, the law enforcement officer must not have violated the Fourteenth Amendment in arriving at the place where the evidence could be plainly viewed. Second, "not only must

the officer be lawfully located in a place from which the object can be plainly seen, but he or she must have a lawful right of access to the object itself." Finally, the object's "incriminating character must also be immediately apparent." Hazel v. Commonwealth, Ky., 833 S.W.2d 831, 833 (1992). The United States Supreme Court has held that officers must have probable cause to believe that items are stolen or contraband to invoke the plain view doctrine. Arizona v. Hicks, 480 U.S. 321, 326, 107 S. Ct. 1149, 94 L.Ed. 347 (1987).

A search warrant was executed by the Pendleton County Sheriff's Department on the Gregg property on July 9, 2001, and the officers seized items ranging from power tools to firearms to a four-wheel ATV. From the record, this court cannot determine if the incriminating nature of these items were readily apparent at the time the officers seized them. Thus, we remand to the circuit court for a hearing. If the court determines that the incriminating nature of a burglary item seized was readily apparent at the time the officers seized it, then that item was properly seized. However, if the criminal nature of the item was not readily apparent, the item was not properly seized and must be suppressed.

For the foregoing reasons, the order of the circuit court is reversed and this cause remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert W. Carran
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky
Frankfort, Kentucky

David A. Smith
Assistant Attorney General
Frankfort, Kentucky