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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001224-MR

HARVEY SIZEMORE

APPELLANT

v. APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 00-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: On October 27, 2000, Kentucky State Police officers executed a search warrant at Harvey Sizemore's Webster County residence. Their discovery of illegal drugs and drug paraphernalia led ultimately to Sizemore's guilty plea to five counts, including trafficking in marijuana, five or more pounds,¹

¹ KRS 218A.1421(4).

and marijuana cultivation, five or more plants.² By judgment entered June 4, 2002, the Webster Circuit Court sentenced Sizemore to five years' imprisonment.

Prior to his guilty plea, Sizemore moved to suppress the evidence seized during the search on the ground that the search warrant ought not to have been issued or relied upon. He reserved his right to appeal from the denial of that motion. He contends that the application for the warrant not only failed to establish probable cause, but included misrepresentations that indicate that the applicant officer was aware of that failure. Although we agree with Sizemore that the trial commissioner erred, issuing a warrant on an inadequate showing of probable cause, we do not agree that the officer's application for the warrant or his and his fellow officers' reliance on it indicated bad faith. Accordingly, we affirm the trial court's judgment.

The Fourth Amendment to the Constitution of the United States and Section 10 of the Constitution of Kentucky interpose between the police officer seeking evidence of crime and the citizen desiring the benefits of privacy a "neutral and detached" magistrate, who is to ensure that the officer's breach of the citizen's privacy is warranted.³ The magistrate is to

² KRS 218A.1423(2).

³ Illinois v. Gates, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983); Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984).

withhold her warrant unless the officer establishes probable cause to believe that his search will reveal contraband or other evidence of crime. The magistrate's role is an important one, affecting both the community's safety and its civility. Her task is

to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before h[er], 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 . . . conclude[ing]" that probable cause existed.⁴

The officer's affidavit in this case described Sizemore's residence and the evidence sought, then stated that

[o]n the 25th day of October, 2000, at approximately 8:00 p.m., affiant received information from informant who shall remain confidential at this time that he had seen marijuana at the residence in several locations. While he was at the residence saw marijuana being smoked.

On the 27th of October, 2000, I received information from the same informant that he had seen marijuana at the same residence within the last 24 hours.

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

⁴ Beemer, 665 S.W.2d at 914-15 (quoting from Jones v. United States, 362 U.S. 257, 271, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960)).

Previously I had received information from an informant stating Sizemore sold drugs from his residence including marijuana. From a separate independent informant in the past, he stated that he had received marijuana from Sizemore at Sizemore's residence.

Acting upon the information I drove past residence and confirmed it was as the informant had described.

Based on this information, the trial commissioner determined that probable cause existed to support the issuance of a warrant. With all due deference to the trial commissioner, this affidavit does not justify the invasion of a person's home. It merely alleges that an unnamed individual claimed to have twice seen marijuana somewhere on Sizemore's property during the last three days and that two other unnamed individuals claimed, at some time or times in the past, to have purchased marijuana from Sizemore at a residence. There is scant indication how the recent informant came to see the alleged marijuana (Was he a visitor in the home? Was she driving past? Does he know what marijuana looks like?); nor does any circumstance suggest that the recent informant was likely to be telling the truth. His statement included no potentially corroborating details and the officer does not claim to be familiar with him. The officers made no meaningful attempt to verify independently that Sizemore was involved in any wrong doing.

What corroboration might have been provided by the other informants was nullified by the fact that their statements were located at indeterminate points "previously" and "in the past." Did these informants buy a joint from Sizemore twenty years ago? Or a pound two weeks ago? The affidavit does not say, and it was the commissioner's duty to base her decision on the facts alleged in the affidavit. Because those facts do not provide a substantial basis for finding the existence of probable cause, we are constrained to agree with Sizemore that the commissioner should not have issued the search warrant.

As the trial court noted, however, evidence seized pursuant to a warrant later invalidated need not be suppressed if the officer's reliance on the warrant was reasonable and in good faith.⁵ Sizemore contends that the officer's reliance on the warrant was neither reasonable nor bona fide. We disagree.

Two officers worked on Sizemore's case. One of the officers had had contact with the informants, but it was the other officer who made the averments of the warrant application. As shown above, the affiant's statements do not reflect that his knowledge of the informants was derived from his partner. Sizemore argues that this oversight suggests an attempt to mislead the commissioner. The trial court found to the

⁵ United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984); Crayton v. Commonwealth, 846 S.W.2d 684 (1992).

contrary, and we agree. Although strict fidelity to the facts would have been better practice, the affiant, relatively inexperienced at the time of this affidavit, was entitled to rely on his fellow officer's observations.⁶ There is no suggestion in the record that the officer intended to mislead.

Sizemore also contends that the officers could not reasonably have relied on a warrant they must have known had been improperly issued. Although generally officers may rely on a facially valid warrant,⁷ warrants based on "bare bones" affidavits--conclusory affidavits lacking any meaningful factual allegations--are exceptions.⁸

The affidavit in this case failed to establish probable cause, but we do not characterize it as "bare bones." It alleged meaningful facts--the informants' observations--that, if they were current, would conceivably have justified the warrant.⁹ This case is similar to Commonwealth v. Litke,¹⁰

⁶ United States v. Ventresca, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965).

⁷ United States v. Leon, *supra*.

⁸ *Id.*; United States v. Weaver, 99 F.3d 1372 (6th Cir. 1996); United States v. Leake, 998 F.2d 1359 (6th Cir. 1993).

⁹ *Cf.* United States v. Harris, 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971) (informant's allegations comported with the defendant's reputation known to the police); United States v. Laws, 808 F.2d 92 (D.C. Cir. 1986) (independent informants provide at least some mutual corroboration).

another case in which a search warrant was deemed invalid because the warrant application failed to allege the currency of its facts. Our Supreme Court held that, notwithstanding that lapse, the officers' reliance on the warrant had been reasonable and suppression was therefore inappropriate. Here too, it appears that the officer could have alleged, but failed to, that the second and third informants had dealt with Sizemore in the recent past. This was a significant mistake, to be sure, one the commissioner should have questioned, but it was not such as to require suppression.

Accordingly, we affirm the June 4, 2002, judgment of the Webster Circuit Court.

ALL CONCUR.

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¹⁰ Ky., 873 S.W.2d 198 (1994).