

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001256-MR

KEVIN SCOTT FAYNE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 02-CR-00157

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, McANULTY, and PAISLEY, Judges.

COMBS, JUDGE. Kevin Fayne appeals from the final judgment and sentence of imprisonment entered by the Fayette Circuit Court on May 13, 2002, following his conditional plea of guilty to cultivation of more than five plants of marijuana (KRS¹ 218A.1423(2)). We affirm.

At the time of his arrest, Fayne was living in Lexington in an apartment owned by the University of Kentucky (UK). On November 13, 2001, two maintenance workers entered his

¹ Kentucky Revised Statutes.

apartment in order to repair a plumbing problem in an adjacent apartment. While there, the workers saw several marijuana plants and a variety of materials used for indoor growing of marijuana. They immediately notified the UK police department of their discovery.

Sergeant T. Chilton arrived on the scene. Although she did not have a warrant, she accompanied the maintenance men into Fayne's apartment. After verifying that the plants were marijuana, Sergeant Chilton made no further search of the apartment. She later testified that she immediately realized that she had made a mistake by entering the apartment without a warrant. When she left the apartment, Sergeant Chilton elicited the assistance of Detective Gregory Hall in obtaining a warrant. Realizing that Sergeant Chilton had made an illegal search of the apartment, Detective Hall testified that he spoke with both of the maintenance men himself and then prepared an affidavit for a search warrant based on the information he had obtained from the workers. Detective Hall's affidavit, which omitted the fact that Sergeant Chilton had entered the apartment, contained the following information:

On the 13th day of November, 2001, at approximately 9:55 a.m., affiant received information from Detective Lisa Blankenship of the University of Kentucky Police Department who stated that 2 members of the University of Kentucky Physical Plant Division entered the listed apartment to

perform maintenance and observed what they believed to be a marijuana growing operation. The two employees secured the room and contacted the University of Kentucky police. Sergeant T. Chilton met with the two employees who were identified as Randall Roseman and James Whitaker. She obtained a written statement from each of the witnesses and then secured the building.

Acting on the information received, affiant conducted the following independent investigation: I spoke with Mr. Randall [sic] who stated that he had seen marijuana in the past and recognized the plants when he saw them. He stated that he had a member of his family who had purchased a farm in Taylor Co. Ky. Approximately six years ago he visited that property and observed what he thought was marijuana. He contacted local law enforcement who confirmed his observations and removed the marijuana plants. He stated that when he entered [Fayne's] apartment he observed several issues of High Times Magazine in the apartment. High Times Magazine is known to law enforcement as a resource used by people who wish to grow their own marijuana. He also described items, which are commonly found in marijuana growing operations such as lights, bottled water and fertilizers. Sergeant Chilton identified the sole tenant of the apartment as Kevin S. Fayne. . . .

After the warrant was issued, officers conducted a search of the apartment. Twenty-three marijuana plants, lights, fans, and other materials necessary for a successful indoor marijuana-growing operation were among the more than 100 separate items seized during the search. Based on the items recovered, the appellant was arrested and indicted on charges of cultivating marijuana and possession of drug paraphernalia.

Fayne moved to suppress the evidence seized from his apartment. He argued that the information used to obtain the warrant was so tainted by the illegal entry of Sergeant Chilton that the items seized pursuant to the warrant should not be used as evidence against him. At the conclusion of the evidentiary hearing, the trial court found that the search warrant was predicated on information obtained directly from the maintenance workers rather than upon the observations of Sergeant Chilton during her warrantless entry into Fayne's apartment. Citing several cases which address the independent source doctrine, including Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), United States v. Murray, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), and Wilson v. Commonwealth, Ky., 37 S.W.3d 745 (2001), the trial court concluded that Sergeant Chilton's illegal entry into Fayne's apartment did not require the exclusion of the evidence subsequently seized pursuant to the warrant.

After his motion to suppress was denied, Fayne entered a conditional plea of guilty to the charge of cultivating marijuana pursuant to RCr² 8.09. The charge of possession of drug paraphernalia was dismissed. Fayne was sentenced to serve one year in prison.

² Kentucky Rules of Criminal Procedure.

We apply a two-part standard of review to the ruling of a trial court on a motion to suppress evidence alleged to have been seized in violation of either the Fourth Amendment to the United States Constitution or Section Ten of the Kentucky Constitution. Stewart v. Commonwealth, Ky.App., 44 S.W.3d 376, 380 (2000). First, we review the record to determine whether the court's findings of fact are supported by substantial evidence. If so supported, they are conclusive. RCr 9.78. Next, we review the trial court's conclusions of law *de novo*.

In his appeal, Fayne argues that the trial court erred in applying the independent source doctrine to deny his motion to suppress the allegedly tainted evidence. Fayne contends that because he had learned about the marijuana from Sergeant Chilton before talking with the maintenance men, Detective Hall:

could no more remove the tainted information from the untainted information than he could remove oil from water. . . . There was simply no way to remove the taint once it polluted the stream of information. To state under oath that information came from a second independent source when it really came from the first source and merely confirmed the first source destroyed the genuineness of that subsequent alleged independent source. . . . Taken as a whole, the facts here do not establish a genuinely independent source. (Appellant's brief, pp. 6-7; emphasis in original.)

Despite Fayne's argument, our Supreme Court has held that:

[e]vidence need not be excluded if the connection between the illegal conduct and the discovery and seizure of the evidence is highly attenuated, or when evidence has been obtained by means "sufficiently distinguishable" from the initial illegality so that the evidence is "purged of the primary taint."

Wilson, supra, 37 S.W.3d at 748, citing Wong Sun v. United States, 371 U.S.471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Relying on Wilson and other authority from both federal and Kentucky courts, the trial court concluded that the evidence against Fayne came from a source sufficiently independent of Sergeant Chilton's illegal action; thus, that suppression was not warranted. See also, Churcwell v. Commonwealth, Ky.App., 843 S.W.2d 336, 340 (1992), and Hazel v. Commonwealth, Ky., 833 S.W.2d 831, 834 (1992). The record irrefutably supports the court's finding that the maintenance men provided the information used to obtain the search warrant. Therefore, we find no error in the trial court's application of the independent source doctrine or in its determination of admissibility of the evidence found in the search conducted pursuant to the warrant.

In essence, Fayne's claim of error focuses on the trial court's assessment of the credibility of Sergeant Chilton and Detective Hall. Both officers admitted that Sergeant Chilton informed Detective Hall that she had seen marijuana in

Fayne's apartment. However, they both testified that Sergeant Chilton did not reveal any other details to her colleague and that the affidavit in support of the warrant was based solely on the information provided by Whitaker and Roseman. Fayne strongly contests the court's acceptance of the version of events recounted by the police and contends that Chilton and Hall are not credible:

Despite Sgt. [sic] Hall's rather acrobatic, though feeble attempt to erect a genuinely independent source by saying he intentionally ignored [the information obtained from Sgt. Chilton], he failed miserably. . . . Pathetic attempts to get stories straight and to play fast and loose with the truth as occurred here ought to make us all blush and then act firmly. They should not make us wink and nod, or to contort farce into legitimacy. (Appellant's brief, pp. 5 and 8.

Persuasive though they are, we do not agree with Fayne's arguments. The trial court alone was vested with discretion to determine the credibility of the witnesses. As the trier of fact, it alone had the right to reject or to believe the officers' testimony. See, Commonwealth v. Anderson, Ky., 934 S.W.2d 276, 278 (1996).

Fayne attacks as clearly erroneous the court's finding that an independent source was the legitimate basis of the information in support of the affidavit for the search warrant. He claims that since the maintenance workers did not know his

identity, they could not possibly have qualified as the independent source and that they were essentially a pretext for improper police activity. He argues that Sergeant Chilton in reality had given his name to Detective Hall -- refuting Hall's testimony that the source of his information for the affidavit had come from the maintenance men.

We find no error. Sergeant Chilton testified (and the trial court was entitled to believe that testimony) that she obtained Fayne's name from the university personnel who manage the apartment building where he lived. The record substantiates that this information was indeed obtained from the other university personnel and that it was not obtained by Sergeant Chilton during the course of her illegal entry into Fayne's apartment. Additionally, the subsequent warrant authorized a search of the apartment, which was described with proper particularity in the affidavit. Fayne's identity was not critical to the issuance of the affidavit. Thus, there was legitimate probable cause for the issuance of the warrant -- as correctly determined by the trial court in its application of the independent source doctrine.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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