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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001606-MR

EDWARD GILBERT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 01-CR-00725

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, GUIDUGLI and McANULTY, JUDGES.

GUIDUGLI, JUDGE. Edward G. Gilbert ("Gilbert") appeals from a judgment of the Fayette Circuit Court entered following a conditional plea of guilty to first-degree trafficking in a controlled substance, tampering with physical evidence, and second-degree persistent felony offender ("PFO"). The plea was conditioned on Gilbert's right to appeal an order denying his motion to suppress evidence and motion to produce the name of a

confidential informant. For the reasons stated herein, we must affirm on appeal.

On July 10, 2001, the Fayette County grand jury indicted Gilbert and a co-defendant on the charge of first-degree trafficking in a controlled substance, tampering with physical evidence, possession of drug paraphernalia, possession of prescription drugs in an improper container, and with PFO. The charges arose after the execution of a search warrant on Gilbert's home on May 21, 2000. Gilbert's residence had been under surveillance after the police received complaints that drugs were being sold from the residence. A confidential informant told the police that drugs could be purchased there, and a second informant was sent into the residence to purchase cocaine. After the second informant was successful in his or her attempt to purchase cocaine, the warrant was issued.

Shortly after the indictment was handed down, Gilbert moved to suppress the evidence on the grounds that the warrant was illegally obtained and executed. A hearing on the motion was conducted on October 10, 2001, wherein Gilbert argued that insufficient probable cause existed for the issuance of the warrant. He also asked the court to compel the Commonwealth to disclose the name of a confidential informant whose information precipitated the issuance of the warrant. The court initially

ruled that Gilbert was entitled to the disclosure, but after another hearing determined that it would not compel disclosure.

Gilbert later entered a guilty plea to first-degree possession of a controlled substance, tampering with physical evidence, and second degree PFO. The plea was conditioned on the retention of his right to appeal the suppression and confidential informant disclosure issues. This appeal followed.

Gilbert first argues that the trial court erred in failing to compel the disclosure of the confidential informant who purchased cocaine at his residence. The informant had purchased cocaine from a third party in the kitchen of Gilbert's residence under police supervision (i.e., a "controlled buy"), and it was on this basis that the police sought and received the search warrant. Gilbert argues that the confidential informant's testimony would be necessary at trial to refute allegations that Gilbert participated in the controlled buy. Gilbert was present in the kitchen of the residence with the confidential informant and the third party who sold the cocaine to the informant.

Kentucky Rule of Evidence (KRE) 508(a) provides in relevant part that the Commonwealth has a privilege to refuse to disclose the identity of a person who has furnished information relating to an investigation of a possible violation of a law. The refusal to disclose the identity of a confidential informant

does not implicate the defendants constitutional right to confront his accusers, Thompkins v. Commonwealth, Ky., 54 S.W.3d 147 (2001), but the disclosure may be required where the informant is a material witness to the crimes charged. Taylor v. Commonwealth, Ky., 987 S.W.2d 302 (1998).

In the matter at bar, the confidential informant was not a material witness to the crimes which formed the basis of the charges against Gilbert. While the informant was a participant in the controlled buy, the charges against Gilbert stemmed from the execution of the search warrant. These charges were wholly different from those which were brought against the third party who sold the illegal drugs to the informant. Had Gilbert been charged with selling cocaine to the informant, he might reasonably argue that Taylor would require the disclosure of the informant's identity. But since the crimes with which Gilbert were charged arose solely from the execution of the search warrant, we cannot conclude that the trial court erred in denying Gilbert's motion to disclose the informant's identity.

Gilbert also argues that the trial court erred when it denied his motion to suppress evidence seized as a result of the search warrant. He maintains that no probable cause existed for the issuance of the warrant because the informant told the police that Gilbert was not the individual who sold him or her the cocaine. He also argues that the warrant was improperly

executed in that the police had no legal basis for entering the apartment without first knocking on the door and requesting entry. Since the warrant was both improperly issued and executed, he argues that the evidence discovered therefrom should have been suppressed.

We find no error in the trial court denial of Gilbert's motion to suppress. On the question of whether the warrant was properly issued, it is clear that the police were apprised by the first confidential informant that cocaine was being sold from the Gilbert's apartment. This information came after one or more neighbors had complained of drug sales at the apartment, after the police had observed high foot traffic into the apartment, and after a second confidential informant stated that cocaine was being sold from the residence.

In order to be validly issued, a search warrant affidavit must 1) reasonably describe the premises to be searched, and 2) state sufficient facts to establish probable cause for the search. Guth v. Commonwealth, Ky. App., 29 S.W.3d 809 (2000), citing Coker v. Commonwealth, Ky. App., 811 S.W.2d 8 (1991). The record indicates that these elements were satisfied. The address of Gilbert's apartment was described with specificity, and the police were availed of sufficient evidence upon which probable cause could reasonably be found. The controlled buy, taken alone, was sufficient to give rise to

probable cause that cocaine could be found at Gilbert's residence, irrespective of his alleged lack of involvement in the sale to the informant. Given all of the information available to the police and reported in the affidavit, we cannot conclude that the warrant was improperly issued.

As to Gilbert's contention that the police improperly executed the warrant by failing to knock and announce, we also find no error. Detective Edward Hart ("Hart") testified that when the police approached the apartment to execute the warrant, several individuals were present apparently engaged in a party at the residence. He went on to state that upon seeing the police, one of the individuals ducked into the apartment and slammed the door shut.

Law enforcement interests may establish the reasonableness of an unannounced entry. Wilson v. Arkansas, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995). One basis upon which unannounced entry may be justified is where police officers have reason to believe that evidence would likely be destroyed if advance notice were given. Id., citing Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). We believe the facts of the matter at bar support the assertion that evidence would likely be destroyed if the police knocked at the door, identified themselves, and waited for the door to be opened. Several individuals were milling about, going in and

out of the apartment, and the record indicates that the number of subjects present was approximately twice that of the number of detectives and officers. Given the fact that the informant had purchased cocaine in the apartment, coupled with Hart's observation that the door was slammed when the police approached, we cannot conclude that the unannounced entry into the apartment was improper, nor that the trial court erred in denying the motion to suppress.

For the foregoing reasons, we affirm the Fayette Circuit Court's denial of Gilbert's motion to compel the release of the informant's identity, and motion to suppress the introduction of the evidence obtained by the search.

ALL CONCUR.

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