

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001902-MR

DARIECE McCAULEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 01-CR-001543

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND TAYLOR, JUDGES.

GUIDUGLI, JUDGE. Dariece McCauley (hereinafter "McCauley") is appealing from the Jefferson Circuit Court's Judgment of Conviction and Sentence entered August 21, 2002, following a jury trial. McCauley was sentenced to fifteen months in prison for her conviction of Illegal Possession of a Controlled Substance (cocaine)¹ and to one day for her conviction of Illegal

¹ KRS 218A.1415.

Use or Possession of Drug Paraphernalia.² She is also appealing from the trial court's prior ruling denying her motion to suppress. Having considered the parties' briefs, the record,³ and the applicable case law, we affirm.

On June 27, 2001, the Jefferson County Grand Jury returned an indictment against McCauley on counts of illegal possession of cocaine and of illegal possession of drug paraphernalia stemming from her arrest on January 23, 2001. The case was originally assigned to Judge Thomas Wine in Division 10, who presided over McCauley's motion to suppress evidence obtained during the search of her residence. The trial court held a suppression hearing on November 5, 2001, at which time McCauley argued that the information provided in the search warrant affidavit regarding the investigating officer's observations of "Carlos" was false, so that the affidavit failed to establish probable cause for the issuance of a warrant.

According to the search warrant affidavit, Officer (now Detective) Daran Hodges (hereinafter "Detective Hodges") stated that he received information from an anonymous source on January 9, 2001, to the effect that "drugs were being sold from

² KRS 218A.500.

³ Counsel for appellant did not file a designation of the record, and the circuit court clerk therefore did not include the videotaped recordings of the jury trial and the suppression hearing in the original certified record. However, the videotapes were later certified as a supplemental record on McCauley's motion on April 3, 2003. We must note that our review of the videotapes was difficult to accomplish because the original videotapes provided by the circuit court clerk's office "skipped" approximately every three to four seconds for almost the entire jury trial.

513 Marshall Ct. Bldg. #44 from a b/m Carlos and b/f Reecy⁴." Detective Hodges had previously received information regarding Carlos from HALO officers. He then conducted his own independent investigation between January 8 and 23, 2001, which included surveillance and review of records. During his surveillance, Detective Hodges saw "a b/m matching description of Carlos", who was described as "5-06/5-08 tall, 150-170 lbs," and saw McCauley come and go from the apartment. He also saw heavy foot and vehicular traffic, resulting in short stays consistent with drug activity, as well as drug transactions taking place in the doorway to the apartment. Additionally, he received information that Carlos stayed at the apartment and that McCauley was the leaseholder.

At the suppression hearing, McCauley contended that Carlos could not have been at the Marshall Court location during the period when Detective Hodges was conducting his surveillance because he was on home incarceration at his mother's residence on Muhammad Ali Boulevard. In order to establish this, McCauley presented testimony from Department of Corrections Officer Rita Taylor (hereinafter "Officer Taylor"), who worked in the home incarceration unit. She testified that Carlos Brown⁵ had been an inmate in the home incarceration program from December 28, 2000, until January 3, 2001, when he was rearrested due to charges

⁴ "Reecy" is a nickname of McCauley.

⁵ McCauley described Carlos Brown as the father of her children.

related to an earlier occurrence. He was returned to home incarceration the following day, and remained in this status until February 1, 2001. During this period, Carlos was on 24-hour watch, was not permitted to leave the Muhammad Ali Boulevard residence, and was required to wear an ankle bracelet. Officer Taylor testified that her records revealed that there were no violations during his period of home incarceration.

After hearing argument from counsel, the trial court found that based upon Officer Taylor's testimony, McCauley successfully challenged the possibility that Carlos was present at 513 Marshall Court on January 9, 2001. The trial court further found that there was no good faith exception as there could be no objective, reasonable basis for Detective Hodges' belief as to the accuracy of his statement. However, even after deleting all references to Carlos in the affidavit, the trial court determined that there was sufficient probable cause to issue the search warrant. Therefore, the trial court denied the motion to suppress. However, the trial court stated that McCauley could use the misrepresentations to attack Detective Hodges' credibility at trial.

Prior to trial, the case was transferred to Judge Geoffrey Morris in Division 13, and a jury trial was scheduled to begin on July 2, 2002. At trial, the Commonwealth presented testimony from several of the investigating officers, including

Detective Hodges. The trial court denied McCauley's motion for a directed verdict at the close of the Commonwealth's case. During her case-in-chief, McCauley testified in her own behalf, and introduced testimony from a friend who was with her when the apartment was searched, from her mother, from another home incarceration unit officer, and from a clerk in the media affairs office. Following deliberation, the jury found McCauley guilty as charged, and later recommended a fifteen-month sentence on the illegal possession of cocaine charge. McCauley filed a motion for a judgment notwithstanding the verdict or for a new trial, arguing that there was an alteration in the discovery the Commonwealth provided, that there were problems with the search warrant, and that Detective Hodges' testimony regarding the injury he incurred in the line of duty exceeded the limit of the trial court's earlier ruling. The trial court denied the motion, and entered a judgment of conviction and sentence on August 21, 2002. This appeal followed.⁶

On appeal, McCauley presents four arguments. First, she argues that the trial court should have granted her motion to suppress because she established that the information contained in the search warrant affidavit was deliberately false and was included solely to induce the judicial officer to sign

⁶ The trial court granted McCauley's motion for bond on appeal on September 3, 2002, set her bond at \$20,000 full cash or \$40,000 property, and released her on a property bond on September 4, 2002.

the warrant. Next, she argues that the Commonwealth altered exculpatory evidence in the discovery it provided. Lastly, McCauley argues that the trial court abused its discretion during the trial by allowing Detective Hodges to testify that he had been shot in the line of duty and by disallowing the introduction of hearsay testimony in the form of conversations between officers and witnesses. On the other hand, the Commonwealth argues that the trial court properly denied the motion to suppress because there was sufficient information to establish probable cause. Furthermore, the Commonwealth argues that the discovery was not altered, that the trial court properly allowed Detective Hodges to testify as to his injury to explain the loss of his case notes, and that, although not preserved, the trial court correctly refused to admit hearsay testimony.

We shall first address the trial court's ruling on the motion to suppress evidence seized during the search of McCauley's apartment pursuant to a warrant. Following the suppression hearing, the trial court made findings to the effect that the affidavit was facially sufficient, that McCauley had successfully challenged the possibility that Carlos was present at the times in question as he was in the home incarceration program at a different address, and that there could be no objective or reasonable belief as to the accuracy of Detective

Hodges' representations to the contrary. Pursuant to Guth v. Commonwealth, Ky.App., 29 S.W.3d 809 (2000), the trial court omitted the information regarding Carlos from the affidavit, but still found that there was sufficient probable cause to support the issuance of the search warrant due to the remaining results of his independent investigation.

On appeal, McCauley continues to argue that the contents of the affidavit in support of the search warrant were deliberately false and that trial court improperly held that the affidavit supported a finding of probable cause without any reference to Carlos. McCauley also attacks Detective Hodges' reliance on an unidentified anonymous source, as opposed to a confidential informant, to support his affidavit. The Commonwealth asserts that the trial court's factual findings are supported by substantial evidence and that its decision is correct as a matter of law.

In reviewing a decision of the trial court on a motion to suppress following a hearing, we must first determine whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive. RCr 9.78; Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998). We must then perform a *de novo* review of the factual findings to determine whether the trial court's decision is correct as a matter of law. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134

L.Ed.2d 911 (1996); Stewart v. Commonwealth, Ky., 44 S.W.3d 376, 380 (2000).

In Guth, supra, this Court addressed the sufficiency of a search warrant affidavit that omitted information concerning the location of a drug transaction. In making its determination, the Guth court referred to a prior decision in Commonwealth v. Smith, Ky.App., 898 S.W.2d 496 (1995), regarding the proper method to attack a facially sufficient affidavit: "To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) would not be sufficient to support a finding of probable cause." Guth v. Commonwealth, 29 S.W.3d at 810, citing Commonwealth v. Smith, 898 S.W.2d at 503. The Guth court also addressed the good faith exception, which provides that "the officer must have an objectively reasonable belief in the sufficiency of the warrant and the probable cause determination." Guth v. Commonwealth, 29 S.W.3d at 812, citing Crayton v. Commonwealth, Ky., 846 S.W.2d 684, 687-88 (1992).

As to the trial court's factual findings, we must hold that those findings are supported by substantial evidence.⁷

Furthermore, having reviewed the trial court's decision on a *de*

⁷ However, in reviewing the affidavit, we question whether Detective Hodges' statements concerning Carlos truly rise to the level of misrepresentations as the trial court found. Detective Hodges did not state that he actually saw Carlos; rather, he stated that he did not know Carlos and that during his surveillance he saw a black male matching Carlos' description entering and leaving McCauley's apartment.

novo basis, we must also hold that the trial court correctly applied the applicable law to its findings and therefore did not commit any error in denying the motion to suppress. As the trial court pointed out on the record, Detective Hodges performed his own independent investigation, which revealed that McCauley was the leaseholder of the apartment in question. He also performed surveillance that revealed a heavy amount of foot and vehicular traffic to and from McCauley's apartment, which was consistent with drug activity, and he saw several drug transactions in her doorway. Because the remaining portions of the affidavit create sufficient probable cause to support the issuance of the search warrant, the trial court properly denied McCauley's motion to suppress.

McCauley spends considerable time in her brief arguing that Detective Hodges' "anonymous source" does not rise to the level of a "confidential informant", so that he should not have been permitted to rely upon the information he obtained from this unidentified "anonymous source" to obtain the search warrant. Furthermore, McCauley attacks this source's information as it pertained to her, as opposed to just Carlos. At the suppression hearing, McCauley merely brushed over the assertion that Detective Hodges did not identify the anonymous source in his affidavit. She did not go into any detail as to why Detective McCauley should not be permitted to rely on this

information, and did not make any assertions as to the propriety of her own identification as a drug dealer. Although we do not believe that McCauley properly preserved this issue for appeal, we nevertheless perceive no merit in this argument.

McCauley next argues that the Commonwealth altered exculpatory evidence in the form of the log sheet detailing evidence seized from her residence upon the execution of the search warrant. She argues that the Commonwealth deleted the "Time Exited" information to cover up what she alleges is the fact that the officers exited the residence five minutes before the crack cocaine, baggies and corners were seized. The Commonwealth argues that McCauley's argument is refuted by the record, and, moreover, that she failed to state how this alleged discrepancy prejudiced her and failed to request any type of relief from this Court. We agree with the Commonwealth.

It is clear from the record that McCauley has no basis for her argument on this issue. Detective Hodges testified that he failed to complete the "Time Exited" portion of the log sheet when he and the other officers completed their search of McCauley's residence. He then turned the log sheet along with the search warrant to the department's legal officer, who would have in turn filed the search warrant and log sheet with the media affairs office. It is the media affairs office's copy of the log sheet that contains the completed "Time Exited" portion.

McCauley has never established who added the additional information to the media affairs office's copy of the log sheet. She has also not established how this could have prejudiced her. McCauley was permitted to present this discrepancy to the jury, and it was within the province of the jury to put whatever emphasis on the discrepancy as it saw fit. Further, McCauley requested no relief. As the Commonwealth argued, this argument provides no basis for a reversal of her conviction.

In her final arguments, McCauley raises two evidentiary issues arising from the jury trial relating to Detective Hodges' testimony that he had been shot in the line of duty and the trial court's refusal to admit hearsay evidence of conversations with officers. It is well settled that a trial court's ruling on an evidentiary matter will not be disturbed in the absence of an abuse of discretion. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996).

As to the first argument, McCauley argues that the trial court improperly expanded its prior ruling and allowed Detective Hodges to testify that he had been shot in the line of duty, which only could have incurred the sympathy of the jury.⁸

⁸ We must note that McCauley seriously misrepresents the nature of Detective Hodges' testimony, and even cites to information not in the appellate record while at the same time providing a reference to the trial videotape. The record of the trial reveals that during cross-examination by McCauley, and after repeated questioning as to his loss of his investigative notes, Detective Hodges stated that he was shot in the line of duty on February 26. He did not testify, as McCauley claims in her brief, that he was shot while serving a search warrant at Marshall Court.

On the other hand, the Commonwealth argues that the trial court did not abuse its discretion in expanding its prior ruling as the nature of Detective Hodges' injury was relevant to explain the loss of his investigative notes. After reviewing the record of the trial, we can find no abuse of discretion in the trial court's ruling. We agree with the Commonwealth's argument that the testimony in question went to Detective Hodges' credibility, and also agree with the Commonwealth's reliance upon Commonwealth v. Maddox, Ky., 955 S.W.2d 718 (1997). Although Maddox dealt with the scope of cross-examination, we believe the same principal applies to the present matter: "Witness credibility is always at issue and relevant evidence which affects credibility should not be excluded." Id. at 221.

McCauley spent a considerable portion of her cross- and re-cross-examination of Detective Hodges attacking his credibility based upon his loss of the investigative notes. Detective Hodges was properly permitted to more extensively explain his lengthy absence from his duties with the police department, the return of his police cruiser to the station and its use by other officers, and the subsequent loss of his notes from the cruiser by testifying as to the nature of his injury. Furthermore, Detective Hodges did not provide any information other than that he was shot and injured in the line of duty. As opposed to what McCauley claims, he did not testify as to what

he was doing (serving a search warrant) or where he was (Marshall Court) when he was shot. The trial court did not abuse its discretion in allowing Detective Hodges to testify that he was shot in the line of duty in order to explain the loss of his investigative notes.

Lastly, McCauley argues that the trial court "erred when it sustained the Commonwealth's hearsay motion concerning the conversation between the officer and the appellant."⁹ McCauley submits that by introducing a conversation she had with Detective Hodges during the search, she was merely doing what Judge Wine had allowed her to do by her previous ruling - attack Detective Hodges' credibility.¹⁰ She also argues that the testimony she sought to introduce was a present sense impression, and therefore should have been admitted as an exception to the hearsay rule. We agree with the Commonwealth that McCauley did not raise this argument before the trial court, and appeared to acquiesce in the ruling. McCauley's attorney went so far as to instruct her not to repeat any conversations she had with the officers. We also note that McCauley failed to preserve any of the testimony at issue by

⁹ We agree with the Commonwealth's observation that there were no hearsay motions made during the trial, and that McCauley is most likely referring to the trial court's ruling sustaining the Commonwealth's objection to the introduction of hearsay testimony.

¹⁰ It appears from our review of the suppression hearing that Judge Wine stated that McCauley was not precluded from raising what he determined to be Detective Hodges' misrepresentations and false statements in the search warrant to attack his credibility at trial.

offering it through an avowal. The trial court did not abuse its discretion by refusing to allow McCauley to introduce hearsay testimony of either her conversation with Detective Hodges or the conversation between her mother and the canine unit officer.

For the foregoing reasons, the Jefferson Circuit Court's Judgment of Conviction and Sentence is affirmed.

TAYLOR, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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