

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001950-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 01-CR-001716

MAURICE PHILLIPS

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: BAKER AND SCHRODER, JUDGES; AND HUDDLESTON, SENIOR
JUDGE.¹

SCHRODER, JUDGE. This is an interlocutory appeal by the Commonwealth from an order suppressing evidence obtained in the searches of appellee's residence and the offices of the Louisville Crematory Corporation for which appellee's church had been appointed receiver. The Commonwealth argues that the trial

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court erred in finding that the search warrants were deficient and that the issuing judge was not impartial and, in the alternative, that appellee did not have standing to challenge the search of the Louisville Crematory Corporation property and that the good faith exception to the warrant requirement applied, as well as the independent source doctrine. We adjudge that the search warrants were properly supported by probable cause and issued by a neutral and detached judge. Hence, we reverse the suppression order and remand the matter for further proceedings.

In 1997, Omnia Church of God, a non-profit corporation, was appointed by the Jefferson Circuit Court as receiver to preserve the corporate assets of Louisville Crematory Corporation ("LCC"), a corporation which maintained and operated three historically significant cemeteries in Louisville. The receivership was apparently ordered as a result of gross mismanagement of the cemeteries and the fact that the cemetery properties had been allowed to fall into disrepair.

The director and agent for service of process for Omnia Church of God ("Omnia") was appellee, Maurice Phillips. Not long after Omnia was appointed receiver of LCC, allegations began surfacing that LCC cemetery properties were still not being maintained and that important historical records were being destroyed or thrown away. Consequently, the Kentucky

Attorney General's Office, charged with investigating violations of the Consumer Protection Act, KRS Chapter 367, began an investigation of the matter in mid to late 2000.

Pursuant to its investigation, the Attorney General's Office learned that funds paid out for the maintenance of the LCC cemeteries were being diverted into other accounts, including the personal joint account of Maurice Phillips and his wife, and consequently were being used for personal expenses of the Phillipses. As part of this investigation, the Attorney General's Office sought at various times to interview Phillips regarding his role and the claimed expenses. Phillips avoided these interviews and also failed to file various accounting reports required by the court in the receivership case.

On January 10, 2001, the Attorney General's Office sought and was granted a search warrant for both the LCC offices and Phillips' personal residence. The judge who granted the warrant was Jefferson Circuit Judge Thomas McDonald, who was also the judge in the LCC civil receivership case. The affidavits for search warrants for both properties sought the following personal property:

Any materials, documents, papers, computers, computer components which relate to the maintenance and care of Eastern Cemetery, Schardein Cemetery and Greenwood Cemetery.

The affiant then checked all the boxes provided on the form attesting to probable and reasonable cause to believe that the-
above property constituted:

Stolen or embezzled property;

Property or things used as the means of committing a crime;

Property or things in the possession of a person who intends to use it as a means of committing a crime;

Property or things in the possession of a person to whom it was delivered for the purpose of concealing it or preventing its discovery and which is intended to be used as a means of committing a crime;

Property or things consisting of evidence which tends to show that a crime has been committed or that a particular person has committed a crime.

The affiant, Arthur Rodgers of the Attorney General's Office, stated the following in support of the search warrants:

Received information from Investigator Bob Winlock, Consumer Protection, Office of the Attorney General. Investigator Rodgers reviewed documents provided by Mr. Winlock who has been investigating activities of Omnia Church of God and its agent Mr. Maurice Phillips regarding possible misuse, misappropriation of funds and failure to provide stewardship over corporate assets of the Louisville Crematory and Cemeteries Company, Inc. (known as LCC) areas of questionable billing, transfer of funds from multiple bank accounts, and misuse of asset funds have been raised by members of the community. Mr. Maurice Phillips has not provided or produced requested documents,

papers or assisted the Attorney General's Office in these matters.

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Investigator Rodgers received an order from Jefferson Circuit Court Division Fifteen (15) reference to Case Number 39-CI-05256, consolidated with 90-CI-01480. This order entered in court on May 2, 1997 and signed by Judge Kenneth Conliffe ordered and adjudged that Omnia Church of God, Inc. be appointed Receiver to preserve the Corporate Assets of the Louisville Crematory and Cemeteries Company, Inc. (LCC) (See Attached Order) Mr. Maurice Phillips was the agent for Omnia and was in court on April 21, 1997 representing the interest of Omnia Church of God, Inc.

The review of multiple bank accounts by Investigator Rodgers show joint accounts through the L & N Credit Union for Mr. Maurice Phillips and his wife, Mary K. Phillips.

On July 1998 the sale of property from the Schardein Cemetery resulted in \$29,849.29 in increased assets. The property was bought by the Kentucky Department of Transportation for road widening on adjacent street. The total funds from this sale have not been adequately accounted for by Mr. Maurice Phillips or his Omnia Church of God. Again Mr. Maurice Phillips refused the Attorney General's Office request for an interview regarding the accountability of funds and production of documents.

Investigator Rodgers after independent investigation and due to Mr. Phillips lack of cooperation believe it is essential to retrieve and protect any and all documents concerning the court order of May 2, 1997. These records, documents will be vital in the determination of assets belonging to Louisville Crematory and Cemeteries, Inc.

The day after the search warrants were granted in this case, Judge Thomas McDonald held an ex parte hearing in the LCC civil receivership case per motion by the Attorney General's Office. At this hearing, the Attorney General's Office, represented by Harold Turner, moved to intervene in the LCC civil receivership case to assist in protecting the community assets at issue in the case. Robert Winlock, the investigator for the Attorney General's Office who supplied information presented in the affidavits for search warrants in the criminal case, was also present at this hearing. Turner advised the court of the questionable nature of Phillips' handling of the LCC assets, specifically noting its suspicion that Phillips had not reported a number of financial transactions and had commingled funds. At the conclusion of this hearing, Judge McDonald passed on the Attorney General's motion to intervene and its motion to dissolve the receivership of Omnia. However, Judge McDonald did sign an order restraining Omnia/Phillips from disposing of or transferring any assets of LCC.

Sometime after the above hearing on that same day, Winlock and other government agents executed the search warrant at Phillips' residence. The next day, January 12, 2001, they executed the search warrant for the LCC offices. In the search of Phillips' residence, the authorities seized various documents

related to the LCC receivership and certain financial records/bank statements of the Phillipses. The search of the LCC offices resulted in seizure of burial records, "miscellaneous files", a fax machine, and a computer.

In July 2001, Phillips was indicted on twenty-five counts of theft by failure to make required disposition and one count of theft by deception over \$300. Subsequently, Phillips moved for suppression of all evidence resulting from the searches of his home and the LCC offices. After a hearing on the motion, the court entered an order on March 6, 2002, suppressing the evidence, specifically finding "[t]he affidavit in support of the search warrants did not constitute probable cause for the issuance of the search warrant." The court went on to state that it would reserve ruling on the issue of whether the searches were nevertheless valid under the good faith exception set forth in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), until it was sufficiently advised on the issue. Finally, the court found that Phillips had standing to challenge the search of the LCC premises.

On August 22, 2001, the court entered a second order again suppressing the evidence obtained in the searches of both the residence and the LCC premises. The court reiterated the absence of probable cause to issue the warrants. The court then adjudged that the good faith exception to the warrant

requirement did not apply because Judge McDonald did not issue the warrant as a detached and neutral magistrate and because the warrants were overbroad in that they did not describe with sufficient particularity the things to be seized. The Commonwealth thereupon filed an interlocutory appeal of the suppression orders to this Court, with a trial date set for October 28, 2003.

We shall first address the pivotal issue in this case - whether the search warrants were supported by probable cause. In determining probable cause for a search:

[m]agistrates and judges must examine the "totality of the circumstances" set forth in the affidavit to determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983) (adopted for purposes of Kentucky Constitution in *Beemer v. Commonwealth*, Ky., 665 S.W.2d 912, 914 (1984)).

Commonwealth v. Smith, Ky. App., 898 S.W.2d 496, 503 & n.2 (1995). "The standard of review for the issuance of a search warrant requires reviewing courts to examine whether the issuing judge had a substantial basis for concluding that the affidavit in support of the warrant established probable cause." Id. However, it has been held that a magistrate's ruling on probable cause should be afforded great deference by reviewing courts.

Illinois v. Gates, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331, 76 L. Ed. 2d 527, 547 (1983).

Phillips essentially argued that the affidavits in support of the search warrants were overly conclusive, too vague, and did not give sufficient detail such as what specific crime(s) were alleged by the Commonwealth. In viewing the affidavits, we see that there were some overly general statements/allegations without adequate support therefor ("Areas of questionable billings, transfer of funds from multiple bank accounts, and misuse of asset funds have been raised by members of the community.") However, the relevant portions of the affidavit were that Phillips' church had been appointed receiver for LCC and was therefore responsible for managing its assets, that Phillips was the agent and representative for Omnia, that almost \$30,000 in funds were paid to LCC, that said funds had not been accounted for by Phillips or his church, and that Phillips would not cooperate with authorities in determining what happened to these funds. These statements were based on information provided by Bob Winlock, an investigator for the Consumer Protection Division of the Attorney General's Office, and were additionally supported by specific references to the receivership order of the Jefferson Circuit Court and detailed information about the sale of LCC property.

Probable cause is a "fluid concept, turning on the assessment of probabilities in particular factual contexts, not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. at 232. The affidavit in support of a search warrant "should be examined under a common sense approach and not in a hypertechnical fashion." United States v. Williams, 10 F.3d 590, 593 (8th Cir. 1993).

The fact that neither the affidavit nor the warrant specifically alleged the crime of theft is not fatal to the warrant in this case. The alleged facts established that Phillips had control over a large sum of money which was missing and which Phillips refused to account for. Under a common sense reading of the affidavit, the issuing judge could properly deduce that the crime of theft was suspected. Further, we believe those facts, combined with the reliability of the informant and the basis of his knowledge, constituted sufficient probable cause to justify the search warrant. See Illinois v. Gates, 462 U.S. at 233. There need not be direct evidence that Phillips committed the crime of theft, only a probability or substantial chance that he committed said crime. See United States v. Morales, 923 F.2d 621, 625 (8th Cir. 1991).

The trial court also found that the warrant was deficient because it failed to describe with particularity the things to be seized. "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 Fourth Amendment to the U.S. Constitution and § 10 of the Kentucky Constitution." Wilson v. Commonwealth, Ky., 621 S.W.2d 894, 895 (1981). This is to minimize the "unlimited discretion in the executing officer's determination of what is subject to seizure and [the] danger that items will be seized when the warrant refers to other items." United States v. Ables, 167 F.3d 1021, 1033 (6th Cir. 1999), cert. denied, 527 U.S. 1027, 119 S. Ct. 2378, 144 L. Ed. 2d 781 (1999) (quoting United States v. Savoca, 761 F.2d 292, 298-99 (6th Cir. 1985)). "However, the degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought. 'Thus a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit.'" United States v. Henson, 848 F.2d 1374, 1383 (6th Cir. 1988), cert. denied, 488 U.S. 1005, 109 S. Ct. 784, 102 L. Ed. 2d 776 (1989) (quoting United States v. Blum, 753 F.2d 999, 1001 (11th Cir. 1985)).

As noted earlier, in the case at bar, the Commonwealth sought through the search warrant "any materials, documents, papers, computers, computer components which relate to the maintenance and care of Eastern Cemetery, Schardein Cemetery and Greenwood Cemetery." In our view, under the circumstances of

this case, the description of the items sought was specific enough to pass constitutional muster. The suspected crime in the present case was theft of monies under the possession and control of Phillips as agent/representative of Omnia and receiver of LCC. Since it was a crime involving money/finances, the evidence of the crime could take any number of documentary forms, as opposed to a crime involving, for instance, murder, wherein the potential evidence would be easier to contemplate and describe with particularity. Furthermore, the more general description of the items sought was qualified by the requirement that the items relate to the maintenance and care of the Eastern, Schardein, or Greenwood Cemeteries. We believe the above qualifying phrase would be a sufficient safeguard against the "general, exploratory rummaging in [Phillips'] belongings" cautioned by the Court in Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2737, 2748, 49 L. Ed. 2d 627 (1976).

In United States v. Davis, 226 F.3d 346 (5th Cir. 2000), cert. denied, 531 U.S. 1181, 121 S. Ct. 1161, 148 L. Ed. 2d 1021 (2001), the defendant was suspected of committing various money-related crimes - wire fraud, money laundering, and securities fraud. In the search warrant for the defendant's home and office, the government listed generic categories of financial documents it was seeking. The Court upheld the search warrant as not being overbroad, stating, "[a]llthough parts of

the warrant described generic categories of documents, rather than specific documents, the fifteen categories of evidence described in the warrant are delineated in as much detail as is practicable for investigating the kind of fraud indicated in this case." Davis, 226 F.3d at 352. Likewise, in the instant case, it would have been difficult and potentially too limiting for the Commonwealth to be more specific regarding the items sought.

Phillips cites United States v. Leary, 846 F.2d 592 (10th Cir. 1988), in support of his position, maintaining that said case is indistinguishable from the case at hand. In Leary, the warrant sought a generic list of business records/documents related to the purchase, sale, and illegal exportation of materials in violation of the federal export laws. The Court found the warrant to be facially overbroad because it authorized a general search in conjunction with a broad federal statute, which was not a sufficient limitation on the scope of the search. The Court specifically noted, however, that if the warrant had been explicitly limited to documents related to a particular transaction, it would have been valid. In our view, the limitation in the warrant in the present case that the items relate to the maintenance and care of the three named cemeteries is sufficiently restrictive to not be considered overbroad.

We shall next address the alleged failing of the warrant to demonstrate a nexus between the items to be seized and the place to be searched. Under Section 10 of the Kentucky Constitution, the affidavit for a search warrant must reasonably describe the property or premises to be searched and must state sufficient facts to establish probable cause for search of that property. Guth v. Commonwealth, Ky. App., 29 S.W.3d 809 (2000); Coker v. Commonwealth, Ky. App., 811 S.W.2d 8 (1991). The affidavits in the instant case stated that the affiant had reasonable and probable grounds to believe that property sought - "any materials, documents, papers, computers, computer components which relate to the maintenance and care of Eastern Cemetery, Schardein Cemetery and Greenwood Cemetery" - was at the two addresses listed on the affidavits. Phillips alleges that the affidavits did not indicate the significance of the home address or the LCC property address, and did not state specific facts to support probable cause that the items sought would be found at those addresses. True, the affidavit did not specifically state why the affiant believed that the documents would be found at Phillips' house or the LCC offices. However, a "Magistrate is permitted to draw reasonable inferences about where evidence is likely to be kept based on the nature of the evidence and the type of the offense." United States v. Davidson, 936 F.2d 856, 860 (6th Cir. 1991). In the case at bar,

the Commonwealth sought business and financial records/documents related to the three named cemeteries, and the offense alleged was theft of funds collected on behalf of those cemeteries by the agent/representative of the appointed receiver. We believe the issuing judge could reasonably infer from that information that such evidence would be at Phillips' home or the LCC offices since such records/documents are typically found in either the residence or place of business of the custodian of those records/documents. Hence, a sufficient nexus between the places to be searched and the items to be seized was established.

The lower court also found the search warrants defective on grounds that the issuing judge was not neutral and detached. The court found that Judge McDonald was partial to the Commonwealth solely because he was the presiding judge on the civil receivership case and because he conducted an ex parte hearing the day after the search warrants were issued to rule on the potential dissolution of Phillips' receivership. It has been well established that in order for a search warrant to be valid, it must be issued by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1948); see also Rooker v. Commonwealth, Ky., 508 S.W.2d 570 (1974). Those cases that have ruled that the issuing judge was

not neutral or detached have been cases where the issuing judge has in some capacity been involved with the police or prosecution in investigating or prosecuting the case. See Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), (where the issuing magistrate was a state attorney general who was personally in charge of investigating a murder, and who later acted as chief prosecutor at trial); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979), (where issuing magistrate was town justice who accompanied the investigating officers to the scene of the crime to help in enforcing the warrant).

The facts in the instant case are very much akin to those in United States v. Bowers, 828 F.2d 1169 (6th Cir. 1987), cert. denied, 486 U.S. 1006, 108 S. Ct. 1731, 100 L. Ed. 2d 195 (1988), wherein the judge, who was also the presiding judge in the related civil receivership case regarding the city sewage treatment system, authorized a warrant for electronic surveillance of individuals suspected of various crimes related to obtaining contracts with the sewage treatment system. The defendants argued that by virtue of the judge's involvement with the civil receivership case, the judge could not be neutral and detached in authorizing the warrant in the criminal matter. The Court disagreed and upheld the warrant, stating:

Judge Feikens had no such links to the prosecution, and he did what any neutral and detached judicial officer would have done if presented with evidence of the type before him; he found that there was probable cause and issued the Title III authorizations for electronic surveillance. His actions did not, in our judgment, bring him within the proscription of the "prosecutorial involvement" line of cases.

Bowers, 828 F.2d at 1175. The Court went on to recognize that "a judge's alleged bias must emanate from some 'extrajudicial source' rather than from participation in judicial proceedings." Id. (quoting Demjanjuk v. Petrovsky, 776 F.2d 571, 577 (6th Cir. 1985), cert. denied, 475 U.S. 1016, 106 S. Ct. 1198, 89 L. Ed. 2d 312 (1986)).

Similarly, in the case before us, there is no allegation or evidence that Judge McDonald had any involvement with the police or prosecution other than his role as judge on the receivership case. The lower court made much of the ex parte hearing granted by Judge McDonald in the civil receivership case to rule on the motion to dissolve Phillips' receivership of LCC. However, this hearing was held the day after the search warrants were issued and there is no indication that Judge McDonald had any ex parte knowledge of the case which colored his decision to issue the search warrants. As we have already discussed above, Judge McDonald properly issued the warrants based on probable cause. Hence, Judge McDonald was

sufficiently neutral and detached to issue the search warrants in this case.

Given our decision above that the warrants were validly supported by probable cause and issued by a neutral and detached judge, the Commonwealth's remaining arguments regarding Phillips' standing to challenge the LCC warrant, the good faith exception, and the independent source doctrine are rendered moot. Accordingly, we reverse the lower court's order suppressing the evidence obtained in the searches of Phillips' home and the LCC offices and remand the matter for further proceedings.

ALL CONCUR.

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