

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002574-MR

DAVID BENNETT

APPELLANT

v. APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
INDICTMENT NO. 02-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, MINTON, and TACKETT, Judges.

MINTON, Judge: David A. Bennett appeals his conviction in Todd Circuit Court following a conditional guilty plea to the charges Possession of controlled substance in first degree (KRS 218A.1415), Possession of drug paraphernalia in first offense (KRS 218A.500(2)), and Facilitation to manufacturing methamphetamine (KRS 506.060 and KRS 218A.1432). Bennett argues on appeal that the trial court erred in denying his motion to suppress evidence obtained in a warranted search of his

residence. Because we hold that the trial court properly denied the suppression motion, we affirm.

On January 14, 2002, Todd County Sheriff's Deputy Keith Wells went to Bennett's mobile home in rural Todd County to arrest Bennett on a Christian County warrant allegedly on the charge of promoting contraband (methamphetamine) in the Christian County Jail. Don Ruby, a member of the Todd County Rescue Squad, and Kentucky State Trooper Craig Engler accompanied Wells. The group arrived at Bennett's residence just before 6:00 p.m. As Bennett emerged from the trailer onto the front porch, Engler, Ruby, and Wells detected the strong odor of ether coming from inside the mobile home. Wells arrested Bennett on the Christian County warrant and placed him in his cruiser. Suspecting criminal activity was afoot, Engler called for backup.

In response to Engler's call, Trooper M. Franklin arrived at Bennett's residence. Franklin and Engler walked behind Bennett's residence where they saw four-wheeler trails leading away from the residence into the surrounding woods. The troopers followed one trail and noticed that reflectors had been nailed to trees. After briefly following the trail, the troopers turned to go back to Bennett's residence. As they approached the house, they heard the recognizable sound of a four-wheel drive all-terrain vehicle (ATV) hurriedly leaving the

house and entering the adjoining woods. The ATV driver ignored the troopers' order to halt. The ATV then entered the highway and sped west on Ky. 507. The troopers pursued the ATV in their cruisers and on foot but lost it when it left the highway and re-entered the woods. While searching for the ATV operator, the troopers encountered a white passenger car on the highway, which they believed to be Bennett's vehicle. After stopping it, Engler verified that it belonged to Bennett and that his wife and daughter were its occupants. Bennett's wife consented to a search of the vehicle but the troopers found nothing relevant. Engler then proceeded to the Todd County Attorney's office to get assistance in obtaining a search warrant.

In the affidavit in support of the search warrant, Engler stated:

Affiant [Engler] went to above residence to assist Deputy Keith Wells with the service of an arrest warrant on David Bennett who resides at the residence described herein. When Bennett came out of the residence he was carrying a flashlight. Affiant and Deputy Wells detected the odor of ether. Affiant and Trooper Franklin walked behind the residence. Affiant observed several trails leading away from the residence. The trails were marked by reflectors of some sort. While Affiant was at the residence a 4-wheeler left the area of the residence and refused and upon seeing the Troopers and being directed to do so to stop and fled from the area [sic]. Affiant and Trooper Franklin pursued the 4-wheeler with their blue lights on. Based upon the Affiant's observations the odor seems to be coming

from the residence or the building situated near the residence.¹

After reviewing the affidavit, Todd Circuit Judge Tyler Gill found probable cause to issue a warrant to search the Bennett residence. Engler returned to Bennett's trailer at approximately 9:47 p.m. and, along with several other law enforcement officers, searched its interior. The search produced approximately three grams of methamphetamine, a working methamphetamine lab, and numerous ingredients and paraphernalia used to manufacture methamphetamine.

A Todd County Grand Jury indicted Bennett on charges of Possession of controlled substance in first degree, Possession of drug paraphernalia in first offense, and Manufacturing methamphetamine, first offense. Bennett filed a motion to suppress the evidence found as a result of the search. He argued that the affidavit as originally presented to Judge Gill was insufficient to support a finding of probable cause on two grounds. First, relying upon United States v. Tate,² Bennett argued that the mere odor of ether emanating from a residence, without other evidence, could not constitute probable cause of criminal activity since ether is a legal substance with numerous legitimate uses. Secondly, Bennett urged that the facts Engler relied upon to obtain the warrant, namely, the odor of ether,

¹ Transcript of the Record (TR) at 6.

² 694 F.2d 1217 (9th Cir. 1982).

was too stale due to the time that had elapsed between the time Engler first detected the presence of ether and the time he executed the search warrant.

The trial court held an evidentiary hearing on Bennett's suppression motion at which Trooper Engler testified to the facts recited above. After hearing and analyzing the evidence, the trial court denied Bennett's motion to suppress. Bennett then entered a conditional guilty plea to amended charges, reserving for appeal the propriety of the denial of his suppression motion. The two grounds supporting the suppression argument below constitute the main thrust of his arguments for reversal on appeal.

When this Court reviews suppression issues, it first reviews the trial court's factual findings to determine whether the findings were supported by substantial evidence. If supported by substantial evidence, the factual findings will be conclusive.³ Next, this Court reviews *de novo* the circuit court's application of the law to the facts to determine whether the trial court's legal conclusions were correct.⁴

Unfortunately for purposes of appellate review, the trial court did not make written findings of fact when it denied Bennett's suppression motion. Bennett argues that this failure

³ Ky. R. Crim. P. (RCr) 9.78.

⁴ Commonwealth v. Neal, Ky.App., 84 S.W.3d 920, 923 (2002).

alone should constitute grounds for reversal. However, this Court finds the Supreme Court's comments in Coleman v. Commonwealth⁵ to be most applicable in this situation:

Although we agree that written findings greatly facilitate appellate review, and we recognize that it is sometimes difficult to discern the basis for a trial court's ruling from on-the-record free-form analysis, we do not believe this a case where we are "left in the dark" as to the basis for the trial court's ruling. Appellant offered no evidence to contradict the Commonwealth's evidence at the hearing, and, in his brief to this Court, Appellant does not contest the factual testimony at the hearing.

Despite the lack of written factual findings, the videotape record of the suppression hearing is sufficient for this Court to review cogently the trial court's denial of Bennett's suppression motion. At the suppression hearing, Bennett offered no evidence to contradict Engler's testimony, nor did he dispute the evidence in his brief. After the evidence was complete, the trial court stated its findings and explained its conclusions on the record. Thus, the Court concludes that the findings that the trial court made on the record were supported by substantial evidence and were conclusive. There is no basis for disturbing those findings on appeal.

⁵ Ky., 100 S.W.3d 745, 749 (2003).

To buttress his argument that the odor of ether alone is insufficient to support issuance of a search warrant, Bennett cites three cases from outside the Commonwealth. This Court finds these cases unpersuasive. Bennett cites United States v. Brodie for the proposition that ether is a legal substance, which is true. But the Brodie court did not suppress the warrantless search for that reason. The Brodie court suppressed the warrantless search because of a lack of evidence of exigent circumstances to support a warrantless entry into the property.⁶ Bennett cites Stewart v. Texas and claims that the Texas Court of Appeals held that the odor of ether did not constitute probable cause to justify a warrantless search. However, Stewart does not stand for that proposition. Like the Brodie case, the Stewart court reversed and suppressed the warrantless search due to a lack of proof of exigent circumstances.⁷ In both cases, officers performed warrantless searches and attempted to justify those searches by claiming exigent circumstances based on the odor of ether. Both courts found no exigent circumstances existed since the officers in both cases did not act in ways consistent with emergency circumstances. In fact, in both cases, the officers waited for extended periods of time

⁶ United States v. Brodie, 975 F.Supp. 851, 854-855 (N.D. Tex. 1997).

⁷ Stewart v. Texas, 681 S.W.2d 744, 778 (Tx.App. 1984)

before they conducted warrantless searches. Neither case applies to the case *sub judice*.

Bennett cites United States v. Tate in which the Ninth Circuit held that the odor of ether by itself did not constitute probable cause. However, the United States Supreme Court vacated Tate and remanded it to the Ninth Circuit for reconsideration in light of United States v. Leon.⁸ While Bennett is correct that the Ninth Circuit later overturned Tate and held that the officers had relied in good faith upon a defective search warrant, this Court declines to adopt the holding of a Ninth Circuit case for application to the facts at hand.

Probable cause exists to issue a search warrant when under the totality of the circumstances it is fairly probable that contraband or evidence of criminal activity will be found at a specific place.⁹ When reviewing an application for a search warrant, the judicial officer is called upon to make a practical, common-sense decision based on the totality of the circumstances set forth in the affidavit attached to the warrant.¹⁰ In the case *sub judice*, the trial court determined under the totality of circumstances that probable cause did

⁸ United States v. Tate, 468 U.S. 1206, 104 S.Ct. 3575, 82 L.Ed.2d 873 (1984).

⁹ Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 915 (1984).

¹⁰ Lovett v. Commonwealth, *supra* at 77, quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332 (1983).

exist. The odor of ether, which the trial court observed to be highly explosive substance which one would not expect to encounter at a residence in rural Todd County, emanating from Bennett's residence, coupled with the fact that the mysterious ATV flight from the residence, was sufficient to establish with a fair probability that evidence of criminal activity would be found inside Bennett's residence. Thus, the trial court correctly determined that the search warrant was supported by probable cause.

Bennett next asserts that staleness is a factor that an issuing judicial officer must consider when reviewing the information that is used as the basis for probable cause and that staleness must be determined by the circumstance of each case. Bennett attempts to distinguish Lovett v. Commonwealth,¹¹ in which an informant observed the appellant manufacture methamphetamine but did not inform the police of the appellant's activities until some two months later. The police used the information as the basis for a search warrant. The Kentucky Supreme Court upheld the warrant because the information indicated that the methamphetamine operation was an ongoing and long-term activity which created the reasonable inference that it would still be found even after two months had passed. After

¹¹ Ky., 103 S.W.3d 72 (2003).

citing Lovett, Bennett claims it is inapplicable to the case *sub judice* since there is no informant but merely the odor of ether.

Bennett argues the odor of ether basis became a stale and unreliable basis since Engler detected it at approximately 6:17 p.m., yet he did not obtain the search warrant until approximately 8:45 p.m., and did not return to execute the warrant until approximately 9:47 p.m. Bennett asserts that ether is such a highly evaporative substance that no credible evidence could have existed before the search which showed that he was engaged in criminal activity. Bennett contends that since the search was conducted several hours after the detection of the odor of ether, the search was stale.

"Whether information supporting probable cause is stale, 'must be determined by the circumstances of each case.'"¹² Bennett contends that because ether is highly evaporative and can neither be stored or accessed indefinitely, the lapse of three and one-half hours between detection of the odor and the execution of the warrant rendered the evidence in the affidavit stale. The question is not whether the ether would have perished within three and a half hours, but would the lapse of that much time render the information contained in the affidavit less likely to support a reasonable probability that evidence of

¹² Lovett v. Commonwealth, *supra* at 80, quoting Sgro v. United States, 287 U.S. 206, 210-11, 53 S.Ct. 138, 140, 77 L.Ed.2d 260 (1932).

criminal activity would be found. According to the affidavit, a strong odor of ether emanated from Bennett's residence, and an unknown individual on an ATV fled the residence shortly after the police arrived to serve Bennett with an unrelated arrest warrant. The passage of time did not weaken the link between Engler's initial observations at Bennett's residence and the evidence found there later. When Engler executed the warrant, it was no less probable that evidence of criminal activity would be found than it would have been when he first detected the incriminating odor. Thus, the trial court did not err when it determined that the information in the affidavit was not stale.

For the foregoing reason, this Court affirms the Todd Circuit Court's denial of Bennett's motion to suppress and affirms his guilty plea.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis Stutsman
ASSISTANT PUBLIC ADVOCATE
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
ATTORNEY GENERAL OF KENTUCKY

Courtney J. Hightower
ASSISTANT ATTORNEY GENERAL
Frankfort, Kentucky