

RENDERED: JULY 9, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000559-MR  
and  
NO. 2003-CA-000758-MR

DAVID NESBITT

APPELLANT

v. APPEALS FROM UNION CIRCUIT COURT  
HONORABLE TOMMY W. CHANDLER, JUDGE  
ACTION NO. 01-CR-00132

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, Chief Judge; EMBERTON and MILLER, Senior Judges.<sup>1</sup>  
COMBS, CHIEF JUDGE. David Nesbitt entered a conditional plea of  
guilty to four counts of trafficking in marijuana and one count  
of trafficking in marijuana while in possession of a firearm.

---

<sup>1</sup> Senior Judge Thomas Emberton and Senior Judge John Miller sitting as  
Special Judge by assignment of the Chief Justice pursuant to Section  
110(5)(b) of the Kentucky Constitution and KRS 21.580.

He reserved for our review the issue of whether the Union Circuit Court erred in denying his motion to suppress the evidence against him. Finding no error, we affirm.

On October 14, 2001, following an extensive investigation in Union County, Robert Kirk, a Kentucky State Police Detective, prepared an application for a search warrant. In his affidavit, Kirk set forth the details of his investigation and stated that on the basis of the work he had done, he had reasonable grounds to believe that items related to illegal drug transactions (including controlled substances, drug paraphernalia, and currency) were to be found at certain identified premises -- among which was Nesbitt's residence. The warrant issued and was executed on October 15, 2001. During the execution of the warrant, officers seized numerous items, including drugs, weapons, and cash. Nesbitt's indictment followed.

Nesbitt sought to suppress the evidence seized from his property. He contended that the affidavit failed to provide probable cause to believe that contraband could be found on his premises. We are not persuaded that the trial court erred by denying Nesbitt's motion to suppress.

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 (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 a search would uncover evidence of wrongdoing. Illinois v. Gates, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527, 547 (1983). A magistrate's ruling on probable cause should be afforded great deference by reviewing courts. Id., citing Spinelli v. Unites States, 393 U.S. 410, 216 L.Ed.2d 637, 89 S.Ct. 584 (1969).

Nesbitt argued that Kirk's affidavit was vague and that it otherwise failed to present enough information to enable the magistrate to make a judgment that probable cause existed. He contends: "The primary problem with all the affidavit is what it doesn't say." Appellant's Brief at 6.

After reviewing the affidavit, we are convinced that the description of the course of the investigation, coupled with reasonable inferences derived from those specific facts, adequately supported a finding of probable cause. The affidavit described four separate occasions upon which either a

cooperating witness or police officers purchased marijuana from Journie Mannahan. In the course of each visit, Mannahan was observed by detectives proceeding to Nesbitt's premises and was able to produce a large quantity of marijuana upon his return. On the fourth occasion (immediately before the warrant was sought), Mannahan was again given "buy money" and was observed proceeding directly to Nesbitt's residence. Mannahan was observed meeting with Nesbitt there. Once again, upon his immediate return, Mannahan was able to produce a large quantity of marijuana to the cooperating witness. These statements were based upon the personal observations of the detectives.

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. Issuing magistrates have the discretion to draw reasonable inferences from the material supplied by applicants for a warrant. 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 (8<sup>th</sup> Cir. 1993).

Under a common sense reading of the affidavit, the issuing judge properly deduced that Nesbitt was the likely source of the marijuana supplied to Mannahan and, in turn, to

the cooperating witness or police officers. The facts presented to the issuing judge strongly indicated the likelihood that Nesbitt was trafficking in marijuana and that evidence of his criminal activities was to be found on his premises. The search warrant was sufficiently supported by probable cause.

Therefore, the trial court did not err by denying Nesbitt's motion to suppress the evidence obtained during the search of his premises. Since we hold that the warrant was validly supported by probable cause, Nesbitt's remaining argument regarding application of the good faith exception is rendered moot and need not be addressed.

Nesbitt also argues that the trial court erred by failing to set aside its forfeiture orders. We disagree. The public policy underlying forfeiture is to provide for seizure of property used in the commission of a crime as well as imposition of an extra penalty for the offense. Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).

KRS<sup>2</sup> 218A.410 authorizes a trial court to order forfeiture of certain items, including property used in the manufacture, distribution, and sale of controlled substances. It also provides for the forfeiture of "everything of value furnished, or intended to be furnished, in exchange for a controlled substance. . . ." KRS 218A.410(j). These items

---

<sup>2</sup> Kentucky Revised Statutes.

include real and personal property traceable to the exchange  
"and all moneys, negotiable instruments, and securities used, or  
intended to be used, to facilitate any violation of this  
chapter. . . ." Id.

Nesbitt contends that the necessary nexus between the  
property ordered forfeited and his criminal activity has never  
been established. He argues that no such nexus exists in fact  
and that, therefore, the seized property was improperly ordered  
forfeited. While a forfeiture hearing was scheduled by the  
trial court, it was ultimately delayed pending a resolution of  
the underlying charges. After Nesbitt's guilty plea was  
accepted, the contemplated hearing was never held.

The Commonwealth responds that Nesbitt agreed to the  
forfeiture orders and that pursuant to the plea agreement, no  
basis for the forfeiture had to be established. After our  
review of the record, we are persuaded that Nesbitt effectively  
waived any right to contest the court's forfeiture orders. The  
trial court did not err by refusing to set them aside.

We affirm the Union Circuit Court's judgment of  
conviction and orders of forfeiture.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steve P. Robey  
Providence, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, Kentucky