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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001111-MR

KELLY JO WOOSLEY

APPELLANT

v. APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
INDICTMENT NO. 01-CR-00118

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, and MINTON, Judges.

MINTON, Judge: Kelly Jo Woosley appeals following a conditional plea of guilty to the charges of tampering with physical evidence and possession of a controlled substance in the third degree. Subsequent to the guilty plea, Woosley also forfeited certain items of household property to the Morganfield Police Department, which forfeiture she also appeals. She had originally also been charged with conspiracy to traffic in

marijuana, but that charge was dismissed through her plea agreement with the Commonwealth.

At issue on appeal is the denial by the circuit court of Woosley's motion to suppress the items seized at her home as a result of a search which she alleges was conducted pursuant to a defective warrant. Her argument is that the affidavit given in support of the warrant application failed to establish probable cause for the search.

Before analyzing the warrant in issue in Kelly Woosley's case, we must provide some background in the related cases involving Rodney Woosley which are addressed separately in Rodney Woosley v. Commonwealth, Nos. 2003-CA-000982-MR and 2003-CA-001112-MR, rendered contemporaneously with this opinion. It should be noted that Rodney and Kelly Woosley shared a residence and had children together, though the two have never been married.

In the cases involving Rodney Woosley, a search warrant was obtained for a Quick Lube on suspicion that he was trafficking in marijuana from the business. The propriety of that warrant and the search conducted pursuant thereto are addressed in our other opinion; however, relevant to the present case is the following language, reproduced exactly from the affidavit in support of the search warrant issued for the Quick Lube:

On the 15 day of August, 2001, at approximately 1915 p.m., affiant received information from:

A confidential informant whom is known to the affiant to be credible and reliable, who has provided information in the past which has been shown to be truthful and reliable. This informant stated to the affiant that on today's date they observed approximately five pounds of processed marijuana under the desk of the Owner Rodney Woosley. Also present were two firearms which they described as Handguns possibly 9MM.

Acting on the information received, affiant conducted the following independent investigation:

Previously the affiant has received information from numerous independent informants information which indicates that Drug Trafficking is occurring at this location. The affiant also has information that marijuana is packaged into parts boxes specifically alternator boxes.

The affiant also has spoken with Sgt. Jeffery W. Hart of the Morganfield Police Department who also has information that Marijuana is trafficked out of this business and usually leaves the business in computer parts boxes.

On the basis of the affidavit recounted above, a warrant was issued by District Judge C. René Williams. The warrant was promptly served, resulting in the discovery of marijuana, cash, two firearms, and miscellaneous drug paraphernalia. The discovery of those items prompted the charges which Rodney Woosley challenges in his separate appeal, which we need not address further here.

Following the search of the Quick Lube, the police sought from Union County Trial Commissioner George B. Simpson a warrant authorizing the search of Rodney Woosley's residence. The affidavit given in support of the application for the search warrant contained the following language, reproduced exactly:

On the 15 day of August, 2001, at approximately 1915 p.m., affiant received information from:

A confidential informant whom is known to the affiant to be credible and reliable, who has provided information in the past which has been shown to be truthful and reliable. This informant stated to the affiant that on today's date they observed approximately five pounds of processed marijuana under the desk of the Owner Rodney Woosley. Also present were two firearms which they described as Handguns possibly 9MM.

Acting on the information received, affiant conducted the following independent investigation:

On August 15, 2001 a search warrant was obtained and executed on the Woosley Business. Illegal drugs, Firearms and other contraband were seized. The evidence confirmed that this operation had been under way for at least several months. Due to the large amount of evidence obtained it is Believed that evidence will also be at his residence.

The "Woosley business" referred to in the second affidavit is the Quick Lube from which Rodney Woosley conducted the alleged marijuana trafficking. However, the affidavit does not explain that it is located across town from the Woosley

residence. Furthermore, the second affidavit contains language cut and pasted from the first affidavit regarding marijuana under Rodney's desk; however, it does not explain that the desk referred to is located in the Quick Lube, not in the residence.

Our analysis is guided by Commonwealth v. Smith,¹ which provides:

To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause. The same basic standard also applies when affidavits omit material facts. An affidavit will be vitiated only if the defendant can show that the police omitted facts with the intent to make, or in reckless disregard of whether the omission made, the affidavit misleading *and* that the affidavit, as supplemented by the omitted information, would not have been sufficient to support a finding of probable cause.

In this case, if we assume the affidavit to be facially sufficient, it is clearly misleading in that it neglects to explain that the processed marijuana was only witnessed in the Quick Lube. As far as can be determined from the record, no informant provided any information with regard to the Woosley residence. Purged of its falsity, the affidavit would properly explain that (1) a confidential informant wit-

¹ Ky.App., 898 S.W.2d 496, 503 (1995) (original emphasis).

nessed marijuana under Rodney Woosley's desk in the Quick Lube; (2) a search warrant was obtained for the Quick Lube and executed that day; (3) the search revealed marijuana, firearms, and drug paraphernalia; and (4) on the basis of the above information regarding the Quick Lube, the police suspected they would find more evidence of wrongdoing at Woosley's residence across town from the Quick Lube.

The question is thus whether the evidence regarding the Quick Lube provides probable cause to secure a warrant to search Woosley's residence. In its brief, the Commonwealth urges us to adopt the reasoning of some federal courts which have allowed evidence of drug trafficking at a defendant's business to establish probable cause to believe evidence of drug trafficking will also be at the defendant's residence.² However, we specifically declined this invitation in Guth v. Commonwealth.³ Instead, our decision in Guth adhered to the interpretation of Section 10 of the Kentucky Constitution espoused in Coker v. Commonwealth⁴ that "an affidavit for a search warrant [must] reasonably describe the property or

² See, e.g., United States v. Reddrick, 90 F.3d 1276 (7th Cir. 1996).

³ Ky.App., 29 S.W.3d 809, 811-12 (2000).

⁴ Ky.App., 811 S.W.2d 8 (1991).

premises to be searched and state sufficient facts to establish probable cause for the search of the property or premises.”⁵

In Guth, the affidavit seeking the search warrant upon which the search of the home of Darian and Carolyn Guth was based alleged that police officers witnessed Darian Guth selling cocaine “in a controlled environment.”⁶ However, the affidavit failed to disclose that the transaction occurred in a motel parking lot “four or five miles from the residence.”⁷ We held that absent specific alleging some connection between the witnessed drug sale and the residence four or five miles away, there could be no probable cause sufficient to issue a warrant to search the residence. This decision was further supported by several cases involving the illegal sale of alcohol in a dry territory, in which sales witnessed in one location, standing alone, did not provide probable cause to search the defendants’ residences.⁸ We see no distinction from the present case.

The Commonwealth attempts to distinguish Guth by arguing that the police officer’s statements regarding the length of time Rodney had been engaged in drug trafficking and

⁵ Guth, *supra*, at 811, quoting Coker at 9 (emphasis omitted).

⁶ Guth at 810.

⁷ *Id.*

⁸ See Childers v. Commonwealth, Ky., 407 S.W.2d 134 (1996); Turner v. Commonwealth, Ky., 328 S.W.2d 413 (1959); Pigg v. Commonwealth, Ky., 299 S.W.2d 796 (1957).

the "massive amount" of evidence discovered at the business allow an inference that evidence would be found at his home. However, nowhere in the affidavit or the record is there an explanation of the basis for concluding how long Rodney had been trafficking in marijuana or why this should lead to an inference regarding his residence. It is equally possible to conclude that a concentration of evidence at the business and an indication that the enterprise has been ongoing for some time suggests that the operation was centered exclusively on the business premises and *not* in his home.

As an alternate argument, the Commonwealth posits that the police were allowed to rely on the warrant pursuant to the "good faith" exception espoused in United States v. Leon⁹ and Crayton v. Commonwealth.¹⁰ Our analysis from Guth is equally applicable here:

[T]he [Leon] Court held that the officer must have an objectively reasonable belief in the sufficiency of the warrant and the probable cause determination. If the affidavit contains false or misleading information, the officer's reliance cannot be reasonable. [] The [circuit] court in [Guth] acknowledged that the affidavit misled the issuing judge concerning the location of the transaction. We agree. Because the officer supplied information which misled the judge, the officer cannot be said to have had an objectively

⁹ 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

¹⁰ Ky., 846 S.W.2d 684 (1992).

reasonable belief in the probable cause determination.¹¹

Similarly, because the officer involved here misled the trial commissioner regarding the location of the desk hiding the marijuana, there cannot be an objectively reasonable belief in the probable cause determination.

Accordingly, the circuit court erred when it refused to suppress the evidence discovered as a result of the search of the Woosley residence. Its judgments regarding Woosley's conditional plea and forfeiture are reversed and the case remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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¹¹ Guth, *supra*, at 812 (internal quotation omitted).