

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001701-MR

LISA D. HAGAN

APPELLANT

v. APPEAL FROM UNION CIRCUIT COURT  
HONORABLE TOMMY CHANDLER, JUDGE  
ACTION NO. 01-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING

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BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Appellant Lisa D. Hagan was convicted pursuant to a conditional guilty plea of possession of a controlled substance, methamphetamine, possession of drug paraphernalia, second offense, and two counts of endangering the welfare of a minor. Her plea was conditioned on a right to appeal the denial of her motion to suppress evidence. She attacked the validity of the search warrant which was issued to search her residence. The circuit court declined to suppress the evidence after

finding the search warrant was supported by probable cause. The court also found no bad faith on the part of the arresting officer.

On appeal, appellant argues that the affidavit does not support a finding of probable cause because the informant was not disclosed, the informant was not shown to be reliable, the affidavit provided no detail, and the information was not corroborated. We agree that the affidavit was deficient and so we reverse. Moreover, we believe the affidavit was so lacking that the trooper was not justified in relying upon it, and so the "good faith exception" does not apply.

The search warrant affidavit, signed by Kentucky State Trooper Chris Armbrust, stated:

On the 17 day of February, 2001, at approximately 1500 p.m., affiant received information from:

A [sic] informant said they [sic] had observed methamphetamine and drug paraphernalia in the last twenty four hours. The informant know [sic] to me and has provided creditable and reliable information in the past which has resulted in arrest's [sic] in violation of KRS 218A.

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

Previous [sic] I have received information in October 2000. I received information from a [sic] independent informant indicating that Lisa Hagen in the manufacture of methamphetamines and

trafficking [sic] in methamphetamines from her house at 101 Madison Street in Uniontown KY.

In December 2000 I received information from another independent informant indicating that they seen [sic] Methamphetamines and the items to manufacture methamphetamines. At Lisa K. Hagen's house in uniontown [sic] Ky.

The trial court found that the affidavit for search warrant provided probable cause, although it acknowledged that the facts did "present a close call."

The court first noted that the only possible presentation of probable cause was the statement at the outset that an informant had observed methamphetamine and drug paraphernalia in the last twenty-four hours. The court noted the problem that the officer did not relate where the informant had seen the methamphetamine and drug paraphernalia. The court added that the "independent investigation" conducted by the officer was not an investigation at all but simply a recitation of "stale" information from several months before. The court stated this information alone would not have been sufficient to support a current warrant.

The court then applied the "totality of the circumstances" test to the affidavit as a whole to determine whether there was probable cause for a search. Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 914 (1984)(adopting the

standard in Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983)). Under that test, the issuing magistrate is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit including the "veracity" and the "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Id. at 914-15. In Gates, 462 U.S. 228-230, 102 S. Ct. at 2327-2328, the Supreme Court rejected the former two-pronged test which required a showing of the basis of knowledge of an informant and establishing the veracity or the reliability of the informant.

The court below concluded that the reliability of the informant was adequately established by the officer's statements that the informant was known to him and had provided reliable information in the past leading to arrests. The court stated that this was "good enough" to establish credibility and reliability. Additionally, the court addressed the affidavit's failure to state where the informant had seen drugs by applying the totality standard. The court decided that the trial commissioner who examined the affidavit was warranted in assuming that the informant viewed the illegal drugs at appellant's residence. The court found that the commissioner "could indeed not reach any other conclusion since all other

references outside the informant's purported statement . . . refer to the defendant and defendant's place of residence where the illegal drugs were in fact found."

On review, this Court must simply ensure that the magistrate had a substantial basis for concluding that probable cause existed. Beemer, 665 S.W.2d at 914-15. We disagree with the trial court's conclusion that the affidavit in this case provided probable cause. It is true that the only statement of fact is that the informant saw methamphetamines and drug paraphernalia in the previous twenty-four hours. The informant's statement did not describe where they were or who, if anyone, possessed them. The informant did not implicate appellant or her residence with this statement. We do not agree that the informant could *only* have meant that the items were seen at appellant's residence.

Additionally, the statement that the informant had provided reliable information before was lacking. The affidavit did not give any relevant detail as to the information provided or how recently this occurred. The trial commissioner had no way of knowing if in the past the informant had provided to the officer detailed and significant information about drug activity or simply supplemental information. The conclusory statement about the informant's reliability does not inform the trial commissioner as to the likelihood that the informant had

familiarity with observing methamphetamine or drug paraphernalia.

We disagree with the trial court that the magistrate could make assumptions as to what the informant might have meant by using the stale information included by the officer. The officer made no connection between the facts he provided as to probable cause and the stale information he provided as his "investigation." Thus, there was no basis for the court to make so vital an assumption. The rule in this jurisdiction is that an affidavit for search warrant must be specific as to time and place, and state facts from which the issuing court can reasonably determine that probable cause existed. Kentucky Constitution § 10; Beets v. Commonwealth, Ky., 437 S.W.2d 493 (1968). The totality of the circumstances standard, moreover, does not abrogate the requirement that the affidavit provide specific facts. Thus, the magistrate should have recognized that the affidavit was not specific as to place.

As the court below mentioned, the officer also failed to provide any investigation. The officer learned nothing about appellant beyond the tip. The officer apparently did not conduct any surveillance. The officer did not even confirm that Lisa Hagan lived at the address which was given to him by an informant several months earlier.

Thus, we do not agree with the trial court that all that was needed was for the officer to attest that the informant had proved creditable and reliable. Instead, the Kentucky and federal constitutions require some specificity as to the facts which support probable cause. A reading of the affidavit provides no clear understanding of where the informant saw drugs and drug paraphernalia. Thus, it cannot support a finding of probable cause.

Additionally, we do not agree with the Commonwealth that the affidavit could only be invalidated if it is shown that it contains intentionally or recklessly false statements. That is applicable only if the affidavit was facially sufficient. Commonwealth v. Smith, Ky. App., 898 S.W.2d 496, 503 (1995) (citing Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). The same basic standard applies to omitted material information in an affidavit. Id. at 503, (citing United States v. Sherrell, 979 F.2d 1315 (8<sup>th</sup> Cir. 1992)). This standard is also to be applied in situations where the affidavit for search warrant was facially sufficient. United States v. Reivich, 793 F.2d 957, 961 (8<sup>th</sup> Cir. 1986). Since we believe that the affidavit was insufficient in describing the place to be searched, this affidavit cannot be regarded as facially sufficient.

Next, the Commonwealth asserts that even if the affidavit is adjudged to be insufficient, evidence seized pursuant to a warrant subsequently invalidated need not be suppressed if it can be shown that the officer's reliance on it was reasonable and in good faith. United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); Crayton v. Commonwealth, 846 S.W.2d 684 (1992). While this is true, the Leon exception is not appropriate in four situations. First, it is inappropriate if the issuing magistrate was "misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." Leon, 468 U.S. at 923, 104 S. Ct. at 3421. Second, it is inappropriate if the magistrate "wholly abandoned his judicial role." Id. Third, it is inappropriate if the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Id. (quoting Brown v. Illinois, 422 U.S. 590, 610-11, 95 S. Ct. 2254, 2265, 45 L. Ed. 2d 416 (1975)). Fourth, it is inappropriate if the warrant is "so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid." Id.

This Court finds that the Leon good-faith exception does not operate to prevent the suppression of the evidence.

Given the extreme lack of facts in the affidavit, we find that a reasonably well-trained officer would have known that the search was illegal notwithstanding the magistrate's authorization.

United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Suppression remains a remedy where the officer's belief in the existence of probable cause is entirely unreasonable, and where the warrant is facially deficient by failing to describe the place to be searched or the thing to be seized. Crayton, 846 S.W.2d at 688.

In this instance, the officer should have been aware that he needed to do some investigation of the informant's tip, or substantiation of the informant's reliability, credibility and basis of knowledge, to show that there was a probability that evidence of a crime would be found in a search of appellant's property. Cf. United States v. Weaver, 99 F.3d 1372 (6<sup>th</sup> Cir. 1996). Thus, we also reverse the trial court on the basis of its finding that the officer acted in good faith.

We reverse the conviction below and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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