

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002004-MR

RICKEY RICH

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE DONALD H. BYROM, JUDGE
ACTION NO. 03-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Ricky Rich appeals from a judgment of the Russell Circuit Court convicting him of three counts of possession of a controlled substance while in possession of a firearm and one count of possession of a controlled substance not in a proper container and sentencing him to eleven years' imprisonment. He argues that the affidavit supporting the search warrant which led to his arrest did not establish

probable cause and that the prosecutor should have been disqualified due to a conflict of interest. We disagree and affirm the trial court's decision.

The Russell Springs Police Department was receiving complaints from area residents that Rich and his girlfriend, Lisa Neat, were selling controlled substances out of the home he shared with his brother, Roy. Roy, a bedfast paraplegic, and Rich both had prescriptions for medications which are considered controlled substances. In January 2003, Sergeant Lee Smith was tipped of by a reliable confidential informant that Rich and Neat had a large quantity of pills and beer at their residence and that they were trafficking in these substances. Smith set up surveillance and officers observed numerous people arriving at the Rich residence, meeting Rich or Neat in an outbuilding and leaving after a few minutes. Based on this information, he asked for a search warrant. Officers executing the warrant found several kinds of beer, whiskey, tequila, brandy, an unloaded .22 caliber rifle, and over 90 pill bottles. Some of the bottles were empty and seven of them were prescribed to people who did not reside there. Six of the bottles contained pills that are considered controlled substances. There also two loaded guns in the kitchen. There were several people present at the residence at the time who were arrested along with Rich and Neat.

Rich was indicted and charged with three counts of trafficking in a controlled substance while in possession of a handgun, one count of possessing a controlled substance not in a proper container and one count of bootlegging. The trial court denied his motion to suppress the evidence against him. On the day of trial, Rich moved to disqualify the prosecutor for an alleged conflict of interest, and the trial court denied this motion as well. The jury acquitted Rich of bootlegging, convicted him of the lesser charge of possession of a controlled substance (three counts) and possession of a controlled substance not in a proper container and recommended an eleven-year sentence. This appeal followed.

Rich argues that the trial court erroneously denied his suppression motion, contending that the affidavit supporting the search warrant lacked probable cause. He claims that the information in the affidavit would not lead a reasonable person to believe that evidence of illegal activity would be discovered at the location to be searched. The pertinent part of the affidavit reads as follows:

On January 4th, 2003 the affiant was told by a confidential informant that at approximately 10:00 a.m. on the morning of January 3rd, 2003 the informant had observed Ricky Rich and Lisa Neat in possession of a large quantity of Busch, Busch Light, and Old Milwaukee beer, and a variety of prescription pain pills, including valium, xanax, and hydrocodone pills, at the previously described residence, which is

under their control and management. The informant further stated that both Lisa Neat and Ricky Rich were illegally delivering and selling alcoholic beverages and prescription pain pills to individuals, as well as selling them at their residence. The informant told the affiant that this activity takes place daily, always during daylight hours, and always terminates at 4:30 p.m., with no activity ever taking place after dark. The affiant states that said confidential informant has numerous times in the past provided accurate and reliable information, and that information provided by the confidential informant on January 4th, 2003 was corroborated by information received from other sources regarding alcoholic beverages and prescription controlled substances being possessed and sold by Ricky Rich and Lisa Neat, and pertaining to their method of operation. The information has further been corroborated by the affiant, and other members of the Russell Springs Police Department, through independent investigation. . . .

Rich contends, since the alcohol was found in an outbuilding unattached to the house, the language in the affidavit referring to Rich and Neat selling illegal substances at their residence was inaccurate. We note that prescription pill bottles, some empty and some containing controlled substances, were found inside the house. Further, the search warrant specifically includes a request to search outbuildings on the property, and thus includes the shed located 50 to 150 feet away from the house. Rich fails to establish that an affidavit describing illegal activity at the residence provides insufficient nexus between the place to be searched and the illegal activity.

Rich next contends that the informant's tip was not sufficiently corroborated and that Smith misrepresented the nature of the corroboration in his affidavit. Smith stated that he had corroborated the informant's information by conducting surveillance, along with Chief Joe Irvin and Assistant Chief Jamie Rogers, the day received the tip from 8:00 a.m. to 3:30 p.m. During that time period, the officers observed

[n]umerous vehicles . . . arriving at and leaving the residence within a few minutes of their arrival. Said traffic being indicative of illegal drug trafficking, and the illegal sale of alcoholic beverages. In addition over the past two weeks the affiant, Assistant Chief Jamie Rogers, and Chief Joe Irvin have all received information from various sources and complaints from area residents regarding the illegal sale of controlled substances and alcoholic beverages at this residence. Both Assistant Chief Jamie Rogers and Chief Joe Irvin have also over the past year received complaints and information regarding the illegal trafficking of drugs and alcoholic beverages at this residence by Ricky Rich and other persons.

Rich has failed to demonstrate that the officers' observations failed to sufficiently corroborate the informant's tip. In addition, Rich makes the singularly unpersuasive argument that the affidavit, by referring to the residence, misrepresents what the officers observed. According to the evidence at trial, Rich and Neat were taking their customers to the shed rather than allowing them inside the house. Rich seeks to compare this alleged discrepancy with the facts in United States v. Baxter,

889 F.2d 731 (6th Cir. 1989), a case which involved an affiant falsely stating that he had received previous accurate information from an informant who was, in fact, unknown to the officer. We disagree with Rich's contention that the language in the affidavit misrepresented what the officers observed.

Rich next argues that the trial court failed to conduct an evidentiary hearing on his pretrial motion to suppress the evidence discovered during the search of the residence and outbuilding. Defense counsel had filed motion claiming that there was no probable cause to support the search warrant. Prior to the start of the trial, the court heard arguments from both sides and verbally denied the suppression motion. There were no witnesses called and no written findings of fact. Kentucky Rule of Criminal Procedure 9.78 requires the trial court to hold an evidentiary hearing and enter findings of fact when a defendant requests suppression of the fruits of a search. Although Rich failed to either ask for an evidentiary hearing or attempt to call witnesses, the rule's language is mandatory. Rich argues that Assistant Chief Jamie Rogers' trial testimony would, if presented during the suppression hearing, have failed to establish proper cause for granting the search warrant. We disagree and, thus, the trial court's failure to hold an evidentiary hearing is harmless error. Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999).

Finally, Rich contends that the trial court should have disqualified the prosecutor for conflict of interest. On the morning of trial, Rich informed defense counsel that the prosecutor, in his previous employment as a private practitioner, had represented an individual named Wayne Carter whom Rich's counsel had unsuccessfully attempted to subpoena. The trial court held a hearing on defense counsel's request to disqualify the prosecutor. The prosecutor stated that he had indeed represented Carter in district court; however, that representation had terminated several months prior to Rich's trial. Rich alleged that Carter that was prosecuted on misdemeanor drug charges arising out of his arrest at Rich's residence when the search warrant was executed. The prosecutor stated that he had no knowledge confirming that his former client's charges had arisen from the search of Rich's residence. Carter was neither a witness at Rich's trial, not a co-defendant. The prosecutor stated without contradiction that he had not gained any knowledge due to his representation of Carter that he could use in the current prosecution. Indeed, Rich's prosecution was based on evidence turned up during the execution of a warrant to search all buildings on the property where he lived. Rich has failed to show any prejudice to his defense which would require the trial court to disqualify the prosecutor in his case.

For the foregoing reasons, the judgment of the Russell
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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