

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002726-MR

TIMOTHY HUTCHINSON

APPELLANTS

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 02-CR-00212

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

McANULTY, JUDGE: A jury convicted Timothy Hutchinson (Hutchinson) of possession of a firearm by a convicted felon. In this matter of right appeal, Hutchinson challenges the validity of the search warrant that law enforcement obtained to search Hutchinson's residence where they discovered the handgun underlying his charge and conviction. In the lower court

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

proceedings, the trial court heard the challenge on Hutchinson's motion to suppress. At the conclusion of the hearing, the trial court denied the motion. Because we find no error in the ruling of the trial court, we affirm.

On the evening of February 8, 2002, two detectives with the Mayfield Police Department allegedly conducted a drug buy from Hutchinson at his residence using a confidential informant (the CI). The following morning, one of the detectives that was working the case, Detective Kenneth A. Waters (Detective Waters), completed an affidavit in support of a search warrant.

In the affidavit, Detective Waters swore to the following:

On February 8, 2002, at approximately 20:00 p.m. [sic], Affiant received information from/observed:
On above date and approx [sic] time, officer was working with Det. B. Caskey and a "CI". The "CI" was wearing a covert listening devise [sic] that was monitored and recorded by above officer. Officers observed the "CI" go to the residence located at "822 College Street". While at the residence the "CI" purchased 2 small baggies containing a green substance represented to him to be marijuana. The "CI" paid \$50.00 dollars for these items with money that the above officers gave to him. The officers observed the "CI" leave the residence and returned to the "meeting spot" to turn over the suspected marijuana to the officers. The "CI" and vehicle was [sic] searched prior to and after the transaction. The officers had

the "CI" in visual contact to and from the residence.

Officers have received numerous complaints from various people in the area, and have observed [sic] themselves several visitors to the residence on various dates and times that would stay for a short length of time at the residence, which is common for drug trafficking [sic]. Officers have also in the past made controlled undercover narcotics purchases from this residence.

In addition to the above typewritten portion,

Detective Waters wrote in the following two sentences:

The purchase was made from Tim Hutchinson who resides there.

The substance field-tested positive for marijuana.

The typewritten portion of the affidavit then continued and stated as follows:

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

Officers set up surveillance [sic] on the residence at various times and days.

Officers observed several visitors to the residence that would only stay for a short length of time. Officers working with a "CI" made controlled narcotics purchases from the residence on various dates and times. Each suspected narcotic field tested positive.

A judge issued a search warrant on the basis of this affidavit. Law enforcement officers executed the warrant that afternoon. Pursuant to the warrant, police searched Hutchinson's residence and found, among other items, a .22 caliber semi-automatic pistol.

Four months later, the Graves County Grand Jury returned an indictment charging Hutchinson with (1) illegal possession of a controlled substance (cocaine) while in possession of a firearm; (2) trafficking in a controlled substance within 1000 yards of a school while in possession of a firearm; (3) illegal possession of a firearm (handgun) by a convicted felon; and (4) illegal possession of drug paraphernalia.

Hutchinson's attorney obtained a copy of the tape-recorded drug buy, which was the foundation for the issuance of the search warrant. After listening to the recording, Hutchinson filed a motion to suppress the items seized in the search on the basis that Detective Waters submitted erroneous information and omitted certain facts in the affidavit for the search warrant. Hutchinson argued that the tape recording of the drug buy contradicted Detective Water's assertion in the affidavit that he observed the "CI" in transit to and from Hutchinson's residence. According to Hutchinson, the tape recording indicated that the officers made no visual observations of the CI to and from the residence and then attempted to mislead the finder of probable cause. In addition, Hutchinson contended in his motion to suppress that the affiant omitted certain facts that would have shown that the CI drove to at least one other residence, picked up a female and drove

around with her. Not only did the CI have contact with this female, but he also made contact with other individuals that were not named in the affidavit. Finally, Hutchinson argued that the affidavit supplied no information establishing the credibility of the CI.

In his motion, Hutchinson concluded that if the affidavit were purged of its falsities and supplemented by the omitted information, it would not be sufficient to support a finding of probable cause. Hutchinson argued that the remaining statements in the affidavit were merely conclusory statements that gave no basis for making a judgment regarding probable cause. Hutchinson requested (1) that all items seized under the search be suppressed after a hearing; and (2) that the Commonwealth reveal the identity of the CI prior to the hearing.

The trial court set a hearing date for Hutchinson's motion. At the hearing, the Commonwealth called the two officers that were involved in the investigation to testify about the events of February 8, 2002. At the conclusion of the hearing, the trial court made findings on the record.

The trial court found that on February 8, 2002, the officers gave the CI money to purchase drugs. They wired the CI and then searched him. The CI drove to Hutchinson's residence, and the officers followed in another car. But because the person that was the subject matter of the investigation was not

there, the CI had to come back a second time. On both occasions, however, the officers observed the CI pull up to the residence of the defendant, stop his car and get out. The court noted that whether or not the officers saw the CI go through the door of the residence was not relevant. Based on these findings, the trial court denied Hutchinson's motion to suppress.

Hutchinson later made a motion to sever the charge of possession of a firearm by a convicted felon from the other three charges in the indictment. The trial court granted this motion and the trial on the firearm possession charge was conducted on September 25, 2003.

Before the trial began, Hutchinson renewed his motion to suppress the evidence recovered in the search. In response to the renewed motion, the trial court stated that he had already made a finding on the matter that the police officers did, in fact, observe the confidential informant enter and leave Hutchinson's residence. Having denied Hutchinson's renewed motion to suppress, the case proceeded to trial on the evidence recovered in the search. At the conclusion of the trial, the jury found Hutchinson guilty of possession of a firearm by a convicted felon for which he was later sentenced to five years in the state penitentiary. This appeal followed.

In this direct appeal, Hutchinson challenges the trial court's denial of his motion to suppress on two grounds. First, Hutchinson asserts that law enforcement officers procured the search warrant by presenting a false and misleading affidavit to the judge. Because the affidavit contained intentionally misleading information and omitted other information, the items seized in the search should be suppressed and the case should be reversed and dismissed.

Second, Hutchinson challenges the warrant on the ground that the affidavit lacked any indicia of reliability of the CI. In the event that this Court concludes that Hutchinson failed to preserve this error, he asks that we review the issue as palpable error under RCr 10.26.

Hutchinson concludes each of his two arguments by stating that the good faith exception to the exclusionary rule found in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), is inapplicable.

Consistent with his arguments before the trial court, Hutchinson first contends that the affidavit in support of the search warrant is grossly misleading because it implies that the police officers searched the CI and the car. It then implies that the CI traveled directly to Hutchinson's residence, bought the marijuana, and returned to the meeting spot where the officers searched him again. Hutchinson asserts that the buy

tape transcript shows that the CI did much more traveling than Detective Waters intentionally omitted from the affidavit. The omitted facts likely would have affected the judge's decision to issue the search warrant. Hutchinson believes that Detective Waters' statement that "[t]he 'CI' and vehicle was [sic] searched prior to and after this transaction," stretches credulity.

With respect to denial of a motion to suppress, this Court reviews the trial court's factual findings for clear error and the legal issues de novo. See Commonwealth v. Whitmore, 92 S.W.3d 76, 79 (Ky. 2002); United States v. Miller, 314 F.3d 265, 267 (6th Cir. 2002).

The Fourth Amendment of the United States Constitution prohibits unreasonable search and seizures. See United States v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) (Fourth Amendment protects against both illegal searches and seizures). In this case, Hutchinson sought and the trial court granted an evidentiary hearing under Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Franks holds:

that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of

probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-156.

Regarding omissions, cases decided after Franks have held that the same basic standard is applicable when it is alleged that the affidavit omits 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.

Commonwealth v. Smith, 898 S.W.2d 496, 503 (Ky.App. 1995) (citing United States v. Sherrell, 979 F.2d 1315, 1318 (8th Cir. 1992) and State v. Garrison, 118 Wash.2d 870, 872-873, 827 P.2d 1388, 1390 (1992)).

In granting a Franks hearing, it may be implied that the trial court believed that Hutchinson satisfactorily made the requisite preliminary showing. Whether Hutchinson prevailed at the hearing, however, was another issue. See Franks at 172.

After hearing the testimony of the officers, the trial court concluded that the affidavit did not contain any false statements. At a suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court.

See Commonwealth v. Whitmore, 92 S.W.3d 76, 79 (Ky. 2002).

Having reviewed the hearing in this case, we see no clear error. Because the buy tape recording was inaudible and incomplete at times, it does not contradict the officers' testimony. It was not improper for the trial court to refuse to accept Hutchinson's characterization of the buy based on Hutchinson's interpretation of the CI's activities.

As to the alleged omissions, the trial court was not convinced that the police officers omitted this information with the intent to mislead. As stated above, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court. After reviewing the suppression hearing and Hutchinson's renewed motion to suppress that he presented before trial, we do not believe the trial court abused its discretion in this case.

In support of his first argument, Hutchinson contends that the search warrant affidavit does not establish a nexus between the place to be searched and the evidence sought. We conclude, however, that this argument was not preserved for our

review. Likewise, Hutchinson did not preserve his second argument on appeal, which pertains to the reliability of the CI.

We acknowledge that Hutchinson questioned the reliability of the CI in his arguments in support of his motion to suppress and sought the identity of the CI in the Franks hearing. But in the Franks hearing, the Commonwealth objected to Detective Caskey revealing the identity of the CI. In response to the objection, the trial court stated that Hutchinson hadn't challenged the reliability of the CI. Hutchinson's attorney responded, "All right." Instead of directing the court's attention to the two sentences pertaining to the CI in his suppression motion, Hutchinson dropped the issue. Thus, the trial court did not hear or rule on the merits of Hutchinson's contention that the officers failed to provide an indicia of reliability of the confidential informant, and a reviewing court will not take up an issue for the first time on appeal. "Even when an objection or motion has been made, the burden continues to rest with the movant to insist that the trial court render a ruling; otherwise, the objection is waived." Thompson v. Commonwealth, 147 S.W.3d 22, 40 (Ky. 2004).

Hutchinson urges this Court to review any unpreserved errors as palpable error under RCr 10.26. In this case, we are not convinced that manifest injustice occurred. We affirm the

decision of the trial court denying Hutchinson's motion to suppress.

ALL CONCUR.

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