

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000180-MR

JAMES A. CRUM

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 03-CR-00221

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BUCKINGHAM, JUDGE: James A. Crum appeals from an order of the Pike Circuit Court denying his motion to suppress evidence. The issue is whether the circuit court erred in determining that the evidence seized from Crum's residence was admissible pursuant to the good-faith exception to the search warrant requirement. We conclude that the court did not err, and we thus affirm.

On April 28, 2000, Trooper Bradley Cure of the Kentucky State Police was dispatched to the scene of a disturbance in Belfry, Kentucky. While on the scene, Trooper Cure was approached by Dora Crum, James Crum's estranged wife.

Ms. Crum informed Trooper Cure that she had just seen two to three pounds of marijuana in James's residence.

Trooper Cure discussed this matter with Pike County Deputy Sheriff Butch McCoy, another officer at the scene. Deputy McCoy, who lived in the area, told Trooper Cure that he had heard that Crum was dealing in marijuana. Deputy McCoy, who had performed undercover drug work for the Pike County Sheriff's Department, also told Trooper Cure that he had received information useful in criminal investigations from Dora Crum in the past.

Later the same day, Trooper Cure filled out an affidavit for search warrant. In the affidavit, he gave a detailed description of the place to be searched. However, when describing the items for which he was searching, he failed to make any reference to the marijuana. Instead, Trooper Cure described what he was looking for as "illegal contraband." When indicating what he had "probable and reasonable cause to believe" the contraband was, he checked all the boxes on the form, including the box indicating "stolen or embezzled property."

Trooper Cure also stated in the affidavit that he had received the information from "a reliable, cooperating informant." He did not mention Dora Crum by name, nor did he mention that she was James Crum's estranged wife or that this

was his first contact with her. Finally, Trooper Cure indicated that he had received other information from Deputy McCoy, but he did not indicate what information had been provided by the deputy.

Trooper Cure presented his sworn affidavit to a trial commissioner, and a search warrant was issued. Trooper Cure executed the warrant the same day. As a result of his search, he recovered approximately two pounds of marijuana, various items of drug paraphernalia, and a bag containing an unknown white powder. Crum was arrested and was indicted in early 2003 on various drug offenses in connection with the search of his residence.

Crum's attorney filed a motion to suppress the evidence, and a suppression hearing was held. Trooper Cure was the only witness to testify at the hearing. In response to questions concerning when Dora Crum had seen the marijuana at Crum's residence, Trooper Cure indicated that she said she had just seen the marijuana there. He further indicated that he sought and executed the search warrant on the same day. He also provided testimony concerning the information he had received from Deputy McCoy. Following Trooper Cure's testimony, the circuit court concluded that the good faith exception applied. The court then entered an order denying Crum's motion to suppress.

Eventually, Crum entered a conditional guilty plea pursuant to a recommendation by the Commonwealth. He agreed to plead guilty and receive a two-year sentence on each of three felony charges and a twelve-month sentence on a misdemeanor charge. The court sentenced Crum in that manner, and it ordered the sentences to run concurrently pursuant to the plea agreement. Following the entry of a final judgment, Crum filed this appeal.

Crum argues that the circuit court erred in denying his suppression motion based on the good-faith exception to the warrant requirement. He asserts that the warrant was invalid because it was obtained due to a defective affidavit. We conclude that his arguments are without merit.

Section 10 of the Kentucky Constitution states that:

The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

The Fourth Amendment to the U.S. Constitution states:

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

The good faith exception to the warrant requirement was adopted by the U.S. Supreme Court in the case of United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, (1984). The good faith exception set forth in the Leon case was adopted by the Kentucky Supreme Court in Crayton v. Commonwealth, 846 S.W.2d 684, 689 (Ky. 1992). Our supreme court stated that "when it appears that the affidavit was made in good faith but the warrant erroneously issued by virtue of judicial error, neither the Constitution nor sound public policy requires suppression of the evidence." Id. at 688.

However, there are circumstances under which the exclusion of evidence obtained pursuant to a search warrant later determined to be flawed or invalid remains an appropriate remedy. In Commonwealth v. Opell, 3 S.W.3d 747, (Ky. App. 1999), this court stated as follows:

Exclusion of evidence remains an appropriate remedy only where the circumstances reveal one of the following circumstances: (1) the affidavit contains "false or misleading information"; (2) the judge who issued the search warrant has abandoned his "detached and neutral role"; (3) the affidavit is so lacking in indicia of probable cause such that the officer's reliance cannot be reasonable; or, (4) the warrant is "facially deficient by failing to describe the place to be searched or the thing to be seized."

Id. at 752, quoting Crayton, 846 S.W.2d at 687-88. Crum argues that the affidavit supporting the search warrant in this case contains false or misleading information and that the warrant was facially deficient by failing to specifically describe marijuana as the thing to be seized.

In Commonwealth v. Smith, 898 S.W.2d 496 (Ky. App. 1995), this court addressed the standard for suppression where the affidavit omits material facts. The court stated as follows:

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.

Id. at 503.

Crum first states that the affidavit contains false and misleading statements because Trooper Cure never specifically identified marijuana as the item to be seized. He notes that Trooper Cure merely identified the item as "illegal contraband." Because marijuana is illegal contraband, we conclude that Trooper Cure's failure to specifically identify it in the affidavit was not a false or misleading statement. Further, Crum argues that the affidavit was false or misleading because the officer checked the box on the form affidavit that

indicated there was probable and reasonable cause to believe that the marijuana constituted "stolen or embezzled property." Assuming the box was intentionally or recklessly checked, the affidavit when purged of it still contains sufficient material, when taken in light of the trooper's testimony, to support probable cause.

Crum also contends that the affidavit contained false or misleading information when it stated that the information was received from a "reliable, cooperating informant." Crum bases his argument on the fact that the trooper failed to identify Dora Crum as James Crum's estranged wife and that the trooper made no mention of the fact that this was his first contact with her. We do not believe that the description of Dora Crum as a "reliable, cooperating informant" was false or misleading, considering the circumstances under which she came forward with the information and the experience Deputy McCoy had with her in the past while doing undercover drug work for the Pike County Sheriff's Department. In short, even though facts were omitted from the affidavit, when the affidavit is considered in light of the testimony at the suppression hearing, we conclude the good faith exception applies.

The order and judgment of the Pike Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

HENRY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, JUDGE, DISSENTING: Because I feel that the affidavit in support of the search warrant in this case is facially invalid, I must respectfully dissent.

On April 28, 2000, Kentucky State Trooper Bradley Cure presented Pike County Trial Commissioner Fred Hatfield with five sheets of paper: A three-page Affidavit for Search Warrant form and a two-page Search Warrant form. The forms are printed "fill-in-the-blanks" forms. On the affidavit form, the trooper wrote in the address of the premises to be searched and a sufficiently detailed description of the premises. Below that on the first page of the affidavit in the blank supplied for vehicles to be searched Trooper Cure wrote "Any and all vehicles on the premises". In the blank for persons to be searched he wrote "Any and all persons on the premises". In the blank supplied for property to be searched for he wrote "Any illegal contraband that may be used in the commission of a crime", and immediately below that "Any and all outbuildings, storage enclosures and containers on the premises." The second page of the affidavit form begins with the printed statement "Affiant states that there is probable and reasonable cause to believe and affiant does believe that said property constitutes (check appropriate box or boxes)." Below that statement is a column of five boxes beside which are printed the following choices:

Stolen or embezzled property;

Property or things used as the means of committing a crime;

Property or things in the possession of a person who intends to use it as a means of committing a crime;

Property or things in the possession of a person to whom it was delivered for the purpose of concealing it or preventing its discovery and which is intended to be used as a means of committing a crime;

Property or things consisting of evidence which tends to show that a crime has been committed or that a particular person has committed a crime.

Each box on the form was checked, even "stolen or embezzled property" even though Trooper Cure had received no information whatever about stolen or embezzled property. Below the boxes is a space in which the requesting officer is to give details about what was observed or the source of information constituting probable cause for issuance of the search warrant. In that space Trooper Cure wrote "A reliable, cooperating informant made this information available on her own free will without threat or promise. The informant advised that James Hill¹ [sic] had on his premises illegal contraband- a quantity

¹ The defendant's name is James Crum, not James Hill, a fact noted and discussed by the circuit court but not raised as an issue on appeal. The trooper's error is probably explained by the fact that James Crum's address is apparently 110 Crum Hill Road, Hatfield, Pike County, Kentucky. The defendant's correct name is given in the first page of the affidavit in the description of the premises to be searched. The fact that the appellant's brief does not refer to the discrepancy probably indicates that he concedes the correctness of the circuit court's ruling that the mistake was a mere "scrivener's error" which falls within the ambit of the "totality of the circumstances" test established in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) and approved in Kentucky by Beemer v.

of." There the statement ends. Below the statement the printed form continues "Acting on the information received, affiant conducted the following independent investigation:" after which is written "Information was also received from Deputy Gary McCoy, Pike County Sheriffs Department Unit 62." The final page of the affidavit is the signature page. The written content supplied by Trooper Cure on the first page of the warrant form is identical to that on the first page of the affidavit form.

It was Commissioner Hatfield's job to examine those five sheets of paper and from their contents alone, determine whether probable cause existed to order a search of James Crum's home.² The majority determined that the affidavit in this case was not defective because it is rescued by the "good faith" exception to the exclusionary rule, which was established by United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) and approved in Kentucky by Crayton v. Commonwealth, 846 S.W.2d 684 (Ky. 1992). In my view the affidavit under review here is excluded from Leon and Crayton analysis because it should have been apparent at a glance to both the officer and the commissioner that the affidavit did not state sufficient

Commonwealth, 665 S.W.2d 912 (Ky. 1984), and the "good faith" exception established in United States v Leon, 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984), approved in Kentucky by Crayton v Commonwealth, 846 S.W.2d 684 (Ky. 1992). Because I agree with the circuit court's ruling on that issue it is not discussed further in the body of the dissent.

² See Crayton, supra, at page 689: "It is the duty of the judicial officer to issue or deny the warrant based solely on the facts contained within the four corners of the affidavit."

probable cause for the issuance of a search warrant. I believe that the affidavit in this case clearly fails under both the third and fourth criteria listed in the majority opinion's citation of Commonwealth v. Opell, 3 S.W.3d 747, 752 (Ky. App. 1999), quoting Crayton, supra, at 687-688; that is, this affidavit is ". . . so lacking in indicia of probable cause such that the officer's reliance cannot be reasonable" and that "the warrant is 'facially deficient by failing to describe the place to be searched or the thing to be seized.'"

Whether probable cause existed to issue a search warrant is an issue of law which we may review independent of the trial court's determination. Commonwealth v. Smith, 898 S.W.2d 496, 504 (Ky. App. 1995).

At the hearing on the suppression motion in this case the trial court allowed the trooper to testify about how he knew the confidential informant was reliable. In other words the court allowed the trooper to supply the information he left off the affidavit and then ruled in essence that the trooper relied on his own undisclosed knowledge in "good faith". Since the search warrant was signed on April 28, 2000 and the suppression hearing was held on May 20, 2003, this information came over three years too late to be considered by the commissioner in reviewing the affidavit. The only information the commissioner properly had before him about the informant's credibility was

the written statement that the informant was "[a] reliable, cooperating informant [who] made this information available on her own free will without threat or promise". As stated in Lovett v. Commonwealth, 103 S.W.3d 72, 78 (Ky. 2003):

Typically, a bare and uncorroborated tip received from a confidential informant, without more, would be insufficient to establish probable cause for a search warrant. (Citation omitted)

Search warrant affidavits often contain information supplied by confidential informants of such a degree of detail and specificity that fabrication is unlikely, or corroboration is possible with minimal additional investigation, as approved by the "totality of the circumstances" approach in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) and Beemer v. Commonwealth, 665 S.W.2d 912 (1984). That was not the case here. The only hint of corroboration on the face of this affidavit is the statement that "[i]nformation was also received from Deputy Gary McCoy, Pike County Sheriff's Department Unit 62", which is no corroboration at all. It is impossible to determine from the face of the affidavit exactly what information Trooper Cure got from Deputy McCoy or whether that information had anything to do with this case.

As noted in the majority opinion, both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution require that the places to be searched

and the persons and things to be seized be specifically described. The final sentence of the circuit court's order overruling the motion to suppress is impossible to reconcile with the plain language of those documents. Referring to the affidavit the court said: "Although the places and people to be searched and the illegal contraband are not *specifically* described, they are *adequately* described in the Affidavit." (Emphasis in original.) On the contrary, if the description is not specific, it is inadequate *per se*. The only description in the affidavit of property to be seized is "Any illegal contraband that may be used in the commission of a crime", which is so broad and vague as to be meaningless. Because the officer checked all the boxes on the affidavit form referring to property, the description is not only vague, it is also ambiguous. The property might be drugs, but it might also be stolen or embezzled property, explosives, counterfeiting equipment or a host of other "contraband". Smith, supra, does not require a defendant to make any kind of showing in regard to an affidavit like the one under review here. The affidavit considered in Smith was very detailed and descriptive and was facially sufficient. See Smith, supra at 503.

The standard for review of a search warrant requires us to ". . . examine whether the issuing judge had a substantial basis for concluding that the affidavit in support of the

warrant established probable cause". Smith, supra, at 503, FN 2, citing Illinois v. Gates, supra, 462 U.S. at 238-239; 103 S.Ct. at 2332; and Beemer v. Commonwealth, supra, at 914. All that Commissioner Hatfield could properly consider in deciding whether to issue this warrant was that some unnamed person had told Trooper Cure that James Crum, who lived at 110 Crum Hill Road in Pike County, Kentucky had "a quantity of illegal contraband" and that the trooper received some unspecified information from Deputy Gary McCoy. The Commissioner did not have a substantial basis for concluding that the affidavit established probable cause. Neither Leon nor Gates nor any of the Kentucky cases that flow from them permit probable cause to be established for the first time at the suppression hearing. I respectfully dissent.

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