

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-002324-MR

MARCUS BOWEN

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
INDICTMENT NO. 03-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Marcus Bowen appeals from an order of the
Greenup Circuit Court denying his motion to suppress evidence found at his residence
pursuant to a search warrant. We affirm.

On May 1, 2003, Bowen was indicted by a Greenup County grand jury on
charges of trafficking in marijuana over 8 ounces, possession of marijuana, possession of

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

drug paraphernalia, two counts of trafficking in a controlled substance (cocaine) in the first degree, possession of a handgun by a convicted felon, possession of a firearm by a convicted felon, and persistent felony offender in the first degree.² The charges stemmed from a search of Bowen's residence in Russell, Kentucky, conducted by Fivco Area Drug Enforcement (FADE) Task Force officers on January 25, 2002, pursuant to a search warrant.

In the affidavit supporting the search warrant for Bowen's residence, Detective David Smith of the Flatwoods Police Department stated that on July 1, 2001, he received information from:

A concerned citizen that they had observed on numerous occasions and particularly on weekends, a high volume of traffic going to and from the BOWEN residence. Persons would enter the residence, stay only a short period of time, and exit the residence.

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

On or between the dates of January 15th, 2002, and January 18th, 2002, officers of the FADE Task Force conducted surveillance at the residence of MARCUS BOWEN located at 100 Crestview Road, Russell, Kentucky. BOWEN was observed leaving the residence in a 1995 GEO Prism, bearing [sic] Kentucky registration 993-GBM, where surveillance was maintained by FADE officers to a location in Greenup County where BOWEN delivered a quantity of Cocaine to a known drug dealer; that in turn sold the Cocaine to a FADE undercover detective. During the course of another transaction, prior to the aforementioned date, the known drug dealer stated to a COOPERATING WITNESS that MARCUS BOWEN delivered the Cocaine that the COOPERATING

² See Kentucky Revised Statutes (KRS) 218A.1421, KRS 218A.1422, KRS 218A.500, KRS 218A.1412 (two counts), KRS 527.040(handgun), KRS 527.040(firearm), and KRS 532.080, respectively.

WITNESS had purchased. This conversation was overheard and tape-recorded by FADE officers. BOWEN was identified by FADE detective DAVID SMITH on both of the aforementioned occasions.

Based on the affidavit, a search warrant was issued for Bowen's residence on January 25, 2002, and was executed the same day. During the search, police found illegal drug-related items, including cocaine residue, several individual bags of marijuana, and drug paraphernalia.

Following the issuance of an indictment, Bowen filed a motion to suppress the evidence found during the search, alleging that the affidavit supporting the search warrant lacked probable cause. After holding an evidentiary hearing pursuant to Kentucky Rule of Criminal Procedure (RCr) 9.78, the court entered an order denying the motion.

Bowen subsequently entered a conditional *Alford* plea to the two cocaine charges, two marijuana charges, and to the drug paraphernalia charge. The court sentenced Bowen to six years' imprisonment. This appeal by Bowen followed.

"Our review of a search warrant must give great deference to the warrant-issuing judge's findings of probable cause and should not be reversed unless arbitrarily exercised." *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005). "Courts should review the sufficiency of an affidavit underlying a search warrant in a commonsense, rather than hypertechnical, manner." *Id.* "The traditional standard for reviewing an issuing judge's finding of probable cause has been that so long as the magistrate had a

substantial basis for concluding that a search warrant would uncover evidence of wrongdoing, the Fourth Amendment requires no more.” *Id.*

“Whether probable cause exists is determined by examining the totality of the circumstances.” *Id.*, citing *United States v. Hammond*, 351 F.3d 765 (6th Cir. 2003).

“Furthermore, the test for probable cause is whether there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Id.* “Probable cause does not require certainty that a crime has been committed or that evidence will be present in the place to be searched.” *Id.*

Bowen first argues that the trial court erred in not excising portions of the warrant that were stale and materially false. We disagree.

Bowen notes that the affidavit signed by Officer Smith contained information gathered from an anonymous tip from a concerned citizen on July 1, 2001, seven months prior to the actual request for a warrant. Bowen contends that the seven-month delay renders the search invalid because the information therein was too “stale to be relevant.” He further contends that the evidence gathered during the surveillance of Bowen's residence prior to January 2002 did not reveal any suspicious activity.

Regarding the January 2002 surveillance, Officer Smith, the affiant, testified at the suppression hearing that he received information from a confidential informant³ (CI) that he could buy cocaine from a Timothy Riggs⁴. Based on this information, Officer Smith arranged for the CI to make a controlled buy, monitored by

³ The confidential informant is also referred to as a “cooperating witness” in the search warrant affidavit, as well as in testimony presented at the suppression hearing.

⁴ Riggs is identified as a “known drug dealer” in the search warrant affidavit.

the police with audio and video recording equipment, from the unsuspecting Riggs. When the CI entered Riggs's residence to make the purchase, Riggs stated he did not have the cocaine on him, but that he would call his supplier and have it delivered by him. Riggs took the CI's money with the understanding that Riggs would use it to pay his supplier and that the CI would return later for the cocaine. While waiting, Officer Smith observed Bowen drive up and enter Riggs's apartment, leaving one or two minutes later. Shortly thereafter, the CI met with Riggs outside the residence and was given the cocaine. While speaking with the CI, Riggs verbally identified Bowen as the cocaine supplier.

A few days later, an undercover FADE Task Force officer, Detective Roy Ison, made another controlled buy. At the suppression hearing, Detective Ison testified that he made this buy directly from Riggs without using the CI as a go-between, although the circumstances were similar. Detective Ison provided cash to Riggs and then waited for Riggs's supplier to bring the cocaine. During the wait, Bowen drove up and entered Riggs's residence, staying only a few minutes. Shortly thereafter, Riggs delivered the cocaine to Detective Ison, telling Ison that Bowen had supplied the cocaine.

Regarding the anonymous tip information from the concerned citizen, although it was received eight months before the affidavit and search warrant⁵, it was

⁵ Concerning whether the anonymous tip was stale, “it is important to look at the nature of the offense and the length of criminal activity, not the simple number of days that have elapsed. Where the offense in question is continuing and ongoing, the passage of time is not of critical importance.” *Ragland v. Commonwealth*, 191 S.W.3d 569, 583-84 (Ky. 2006). “[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significance.” *Id.* at 584. Here, the affidavit stated

corroborated by information gathered from the two drug transactions with Riggs. *See U.S. v. Spikes*, 158 F.3d 913, 924 (6th Cir. 1998)(“where recent information corroborates otherwise stale information, probable cause may be found”). The information from Riggs provided a sufficient nexus between the anonymous tip from the concerned citizen and Bowen’s residence. Regardless, even if the anonymous tip information was considered too stale and even if it was excised from the search warrant affidavit, ample other evidence from the drug transactions with Riggs provided probable cause to believe Bowen was engaged in illegal drug dealing⁶.

Under the totality of the circumstances, substantial evidence supported a finding of probable cause for the issuance of the search warrant. The considerable testimony of Officers Smith and Ison at the suppression hearing provided ample evidence to support the court’s findings. Accordingly, we find no error in the trial court’s denial of the motion to suppress.

The order of the Greenup Circuit Court is affirmed.

ALL CONCUR.

that the affiant had information from a “concerned citizen” that indicated evidence of illegal drug activity (numerous occasions of high volume traffic to Bowen residence and persons entering and leaving after short period), an activity of an ongoing and continuous nature.

⁶ Bowen's apartment was under surveillance at the time of the second transaction. Police testimony revealed that Bowen left his apartment immediately before driving to Riggs's apartment to deliver the cocaine. This provided probable cause to support the search of Bowen's residence.

BRIEF FOR APPELLANT:

Robin L. Webb
Grayson, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky