

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001330-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 04-CR-00142

RICKY BUNCH

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: The Commonwealth of Kentucky appeals from an order of the Marshall Circuit Court granting the motion of Ricky Bunch to suppress evidence obtained during a search of Bunch's residence. The circuit court found that the search warrant was improperly issued because it was based on the statement of a confidential informant whose reliability was unproven. The court also found that no independent investigation of the

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.

informant's claims was undertaken. For the reasons stated below, we reverse the order of the Marshall Circuit Court and remand the matter for further proceedings.

The facts are not in dispute. On June 5, 2005, Marshall County Deputy Stephen Oakley conducted a traffic stop of a vehicle operated by Jackie Alexander. Oakley arrested Alexander for driving on a DUI-suspended license. She was also found to be in possession of methamphetamine.

Alexander subsequently gave a statement to Oakley revealing that she had purchased the methamphetamine from Teresa Bunch on the previous day. Alexander also stated that earlier during the day of her arrest, she had returned to Teresa Bunch's house and observed her smoking methamphetamine.

The Commonwealth sought and obtained from the Marshall District Court a search warrant for the Bunch residence. The warrant was based on the information provided by Alexander (whose name was not revealed), and on statements of the Marshall County Sheriff's Department that it had previously received numerous complaints of drug trafficking at the Bunch residence, and that it had information indicating that Ricky Bunch had stolen anhydrous ammonia for the purpose of manufacturing methamphetamine.

When the search warrant was executed, deputies found methamphetamine and drug paraphernalia. Ricky Bunch was

arrested. He subsequently filed a pro se brief challenging the issuance of the warrant and seeking to suppress the evidence obtained therefrom. After conducting a hearing on the matter, the Marshall Circuit Court entered an order on June 16, 2005, granting the motion to suppress. The court found in relevant part that law enforcement had not conducted an independent investigation of Alexander's claims, and that the warrant's supportive affidavit gave no indicia of Alexander's reliability. This appeal followed.

The Commonwealth now argues that the affidavit supported the issuance of the search warrant, and that the circuit court erred in failing to so rule. It maintains that the trial court's basis for suppressing the evidence, to wit, no indicia of Alexander's reliability and the lack of an independent investigation, are not the correct measure for determining if the warrant was properly issued. It directs our attention to Lovett v. Commonwealth,² which recognized the United States Supreme Court's abandonment of the Spinelli³ two-pronged test and the adoption of a totality of the circumstances approach for determining if an informant's tip created probable cause for the issuance of a warrant. The Commonwealth argues

² 103 S.W.3d 72 (Ky. 2003).

³ Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

that Alexander's information was reliable and reasonably supported the issuance of the warrant. Conversely, Ricky Bunch argues pro se that Alexander's information was not reliable and did not create probable cause, and that the circuit court properly so ruled.

We find the Commonwealth's argument persuasive. In Lovett, the Supreme Court of Kentucky addressed the test for determining whether a confidential informant's statement supports a finding of probable cause and the issuance of a search warrant arising therefrom. It states in relevant part as follows:

In Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the United States Supreme Court abandoned the rigid two-pronged test established by its previous holdings in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and adopted a "totality of the circumstances" approach for determining whether an informant's tip provided probable cause for the issuance of a search warrant. 462 U.S. at 230-31, 103 S.Ct. at 2328. Under this test, the issuing magistrate need only "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 238, 103 S.Ct. at 2332. While an informant's veracity, reliability, and basis of knowledge are all "relevant considerations in the totality of the circumstances analysis," they are not

conclusive and "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." Id. at 233, 103 S.Ct. at 2329. Thus, the mere fact that DeFew's affidavit did not contain recitations as to the informant's veracity, reliability, and basis of knowledge is not conclusive that the warrant was issued without probable cause.

Gates also explained that a magistrate's determination of probable cause is entitled to "great deference" and should be upheld so long as the magistrate, considering the totality of the circumstances, had a "substantial basis for concluding that a search would uncover evidence of wrongdoing." Id. at 236, 103 S.Ct. at 2331 (internal quotation omitted); Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 914 (1984); see also Massachusetts v. Upton, 466 U.S. 727, 732-33, 104 S.Ct. 2085, 2087, 80 L.Ed.2d 721 (1984)(reemphasizing Gates). It is within this rubric that we evaluate the decision of the trial court.

Typically, a bare and uncorroborated tip received from a confidential informant, without more, would be insufficient to establish probable cause for a search warrant. E.g., Florida v. J.L., 529 U.S. 266, 270, 120 S.Ct. 1375, 1378, 146 L.Ed.2d 254 (2000). This is not such a case. As stated supra, the totality of the circumstances test requires a balancing of the relative indicia of reliability accompanying an informant's tip. Gates, supra, at 234, 103 S.Ct. at 2330. Thus, while a court may question an informant's motives, an "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles [the informants] tip to greater weight than might otherwise be the

case." Id.; United States v. Sonagere, 30 F.3d 51, 53 (6th Cir.1994).⁴

The Lovett holding may be distilled into the following inquiry: whether the affidavit revealed "a fair probability that the contraband or evidence of a crime will be found in a particular place."⁵ In the matter at bar, Alexander's statement was not a "bare and uncorroborated tip" upon which law enforcement could not reasonably rely.⁶ Rather, Alexander was found to be in possession of methamphetamine and admitted buying it at the Bunch residence. Applying Lovett, the question then becomes whether this admission against penal interest, coupled with Alexander's statement that she observed Teresa Bunch smoking methamphetamine hours earlier at the Bunch residence, would lead one to be reasonably suspicious (i.e., have probable cause) that evidence of criminal conduct would be found at the Bunch residence. This question must be answered in the affirmative. This conclusion is bolstered by application of the rule that an explicit and detailed description of alleged wrongdoing, coupled with a statement that the event was observed

⁴ Lovett, 103 S.W.3d at 77.

⁵ Lovett at 78.

⁶ Id.

first-hand, entitles the informant's tip to greater weight than might otherwise be the case.⁷

The circuit court's conclusion on this issue must be given great deference.⁸ Nevertheless, the record and the law compel us to conclude that the affidavit gave rise to a "fair probability" that evidence of methamphetamine possession or sales would be found at the Bunch residence. Applying Lovett to the facts at bar supports a finding of probable cause and the issuance of the search warrant, and the circuit court erred in failing to so rule.

For the foregoing reasons, we reverse the order of the Marshall Circuit Court and remand the matter for proceedings consistent with this opinion.

ALL CONCUR.

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⁷ Id., citing Gates, supra.

⁸ Id.