

RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002260-MR

JOHN R. SPARKS

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE DANIEL SPARKS, JUDGE
ACTION NO. 04-CR-00139

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.¹

BARBER, JUDGE: Appellant, John R. Sparks (Sparks), appeals the denial of a motion to suppress. We affirm the Johnson Circuit Court's denial of the motion.

Sparks was charged with drug possession and trafficking. Sparks entered a conditional plea of guilty to the charged offenses. Following conviction, Sparks appealed the

¹ Senior Judges Joseph R. Huddleston and Lewis G. Paisley, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Johnson Circuit Court's denial of his motion to suppress.

Sparks claimed there was no nexus between the reasons given for the search of his home: That he was a suspect in a burglary in Johnson County, Kentucky, and information given by a confidential informant that he spent several thousand dollars on a vacation and drugs in Tennessee. He contends that the court's denial of his motion to suppress was in error.

We find that this issue is properly before this Court based on clear statements in the record showing that the judge denied the motion to suppress. We further find that the totality of the evidence presented in the affidavit supporting the search warrant makes its issuance valid. The motion to suppress was properly denied.

Highland Accounting, in Paintsville, Kentucky, was burglarized on June 1, 2004. The burglar took 50,000.00 to \$100,000.00 in cash, in \$50 and \$100 bills. Sparks had been doing interior work at the business location on dates prior to the burglary. The building owner stated that Sparks had told her that he knew where she kept the money. The month after the burglary, Sparks and his girlfriend and her son went to Sevierville, Tennessee. They rented a chalet, purchased several thousand dollars worth of NASCAR collectibles, and did tourist-type activities, paying for all the above in cash. The investigating officers stated that a confidential informant in

Johnson County also told them that Sparks bought several thousand dollars worth of cocaine in Tennessee. While they were in Tennessee, the son of Sparks' girlfriend died of a drug overdose. Sparks paid for the funeral in cash. Johnson County police found out that drugs and NASCAR collectibles were found in the rented chalet where Sparks was staying. Based on this information and the fact that Sparks was not permanently employed and had not received any recent cash settlements, the police obtained a search warrant to look for evidence of the burglary in his home. The search turned up guns, drug paraphernalia, and money.

A suppression hearing was held on January 6, 2005. At the conclusion of the suppression hearing, the trial court Judge stated that he would rule within ten days, and that the parties may, but are not required to, submit briefs in support of their positions. Neither party chose to submit a brief. On October 3, 2005, Sparks accepted the conditional guilty plea offered by the Commonwealth. This plea was unrelated to the burglary, but was a plea of guilty to the drug possession charges. At the entry of the plea, the trial court stated:

Before I begin, I want to state for the record that this is a conditional plea based upon [defense counsel's] statement that he wishes to raise the issue on appeal of the court's overruling of a motion to suppress and the validity of the search warrant. Is that correct Mr. Spencer?

Defense counsel: Yes.

The court confirmed, later in the hearing, that Sparks was reserving the right of appeal:

At the outcome of the appeal, if the appeal is successful, the evidence will be returned absent the contraband to Mr. Sparks.

At sentencing, the court again addressed the issue of the conditional guilty plea, stating:

This is a conditional plea. It's conditioned on the reservation by the defendant and his right to appeal the Order denying the Motion to Suppress.

Despite the extensive record showing that the plea was conditional and reserved Sparks' right to appeal the denial of his motion to suppress, the Commonwealth argues before this Court that Sparks' argument is moot because the record does not contain a written denial of the motion to suppress. The Commonwealth asserts that the matter was "not decided by the trial court" and therefore cannot be appealed. RCr 8.09 permits appeal of an adverse determination of any specific trial or pretrial motion upon a conditional plea of guilty. The Commonwealth attempts to extend this plain rule of law by claiming that a written order is required before the adverse determination may be appealed. Nowhere does the law or rules of criminal procedure so provide.

The Commonwealth asserts that there must be an "actual order," in the record. The Commonwealth is well aware of the trial court's ruling, as the record is replete with comments by the judge stating that Sparks plans to appeal the denial of the motion to suppress, yet it contends that without an actual order on paper, no appeal is permitted. Unlike the case of Board of Education of Berea v. Muncy, 239 S.W.2d 471 (Ky. 1951), cited by the Commonwealth, this is not a situation where the trial court had no opportunity to make a ruling prior to entry of judgment. The court was well aware that Sparks planned to appeal the adverse determination, and stated so on the record and throughout the hearings. The matter was before the trial court, an adverse determination was plainly made, and thus the case is properly before this Court.

The Commonwealth then asserts that the search of Sparks' trailer was in accordance with law. When questioned in the suppression hearing, the investigating officer stated that the connection between the burglary and the evidence seized was that Sparks "was spending all this money. . . ." The officer also stated that the confidential informant told them that Sparks was spending "vast sums" of money on drugs.

The law requires that a search warrant be supported by an affidavit stating "sufficient facts to establish probable cause" for the search. Coker v. Commonwealth, 811 S.W.2d 8, 9

(Ky. 1991). The affidavit used to support the search warrant is an affidavit stating that Sparks was a suspect in a burglary and that following the burglary he had spent cash in excess of that which he could reasonably be expected to possess. Exhibit "A" attached to the affidavit for search warrant, listing the items to be searched for, does not list anything which could be considered connected to the burglary but deals only with evidence associated with drug trafficking.

Sparks complains that no nexus was shown between the suspected drug transaction in Tennessee and the search of his residence. When questioned, the investigating officer detailed the suspected link between Sparks and the burglary as "the fact that he was spending all this money . . . was our connection to the burglary." The Commonwealth claims that the police had probable cause to believe the stolen cash or proceeds or contraband purchased with stolen funds was inside Sparks' house. The search did not reveal anything linking Sparks to the burglary and he was not ultimately charged with the burglary. The search did reveal drug paraphernalia and Sparks was charged with drug offenses.

A search warrant may not issue unless probable cause for the search is established by oath or affirmation in the supporting affidavit. Id. at 8.

Factual findings of the trial court regarding the validity of a search warrant are conclusive if supported by substantial evidence. RCr 9.78; Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999). In making such a determination, the court must review the warrant and affidavit in light of the totality of the circumstances surrounding its issuance. Hause v. Commonwealth, 83 S.W.3d 1, 9 (Ky.App. 2001).

The Kentucky Supreme Court has held that:

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. Courts should review the sufficiency of an affidavit underlying a search warrant in a commonsense, rather than a hypertechnical, manner. 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. U.S.C.A. CONST. Amend. 4. United States v. Miller, 314 F.3d 265, (6th Cir.2002), rehearing and suggestion for rehearing denied, cert. denied, 539 U.S. 908, 123 S.Ct. 2261, 156 L.Ed.2d 121; see also United States v. Ware, 338 F.3d 476 (6th Cir.2003).

Whether probable cause exists is determined by examining the totality of the circumstances. 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. See Miller, supra. Probable cause does not require certainty

that a crime has been committed or that evidence will be present in the place to be searched. United States v. Hall, 8 F.App. 529, (5th Cir.2001), cert. denied, 536 U.S. 961, 122 S.Ct. 2668, 153 L.Ed.2d 841 (2002).

Moore v. Commonwealth, 159 S.W.3d 325, 328 (Ky. 2005). Using such a standard, this Court must find that the totality of the evidence before the trial court at the suppression hearing supported the validity of the search warrant. No reversible error in the denial of the motion to suppress is shown. The ruling of the Johnson Circuit Court is affirmed.

ALL CONCUR.

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