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(2007-SC-0415-D)

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000860-MR

AUBREY WAYNE RITCHIE

APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE R. JEFFREY HINES, JUDGE  
INDICTMENT NO. 05-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Aubrey Wayne Ritchie appeals from two orders of the McCracken Circuit Court denying his motions to suppress evidence found at his residence pursuant to a search warrant. We affirm.

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<sup>1</sup> 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.

On January 14, 2005, Ritchie was indicted by a McCracken County grand jury on charges of first-degree possession of a controlled substance (methamphetamine) (firearm enhanced) and use or possession of drug paraphernalia.<sup>2</sup> The charges stemmed from a search of Ritchie's residence conducted by the Paducah Police Department on November 16, 2004, pursuant to a search warrant.

In the affidavit supporting the search warrant for Ritchie's residence, Officer Eric Jackson of the Paducah Police Department stated:

On or about the month of August, affiant received information from:

We received anonymous information that Aubrey Ritchie was involved in selling illegal drugs.

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

On 11-15-04 Det. Tolliver and Sgt. Jackson conducted a trash pull at the home of Aubrey Ritchie. In the trash I found a marijuana stem, a piece of a baggie and mail belonging to Aubrey Ritchie. The marijuana field tested positive.

Based on the affidavit, a search warrant was issued for Ritchie's residence. During the search, police found illegal drug-related items, including methamphetamine and drug paraphernalia.

Ritchie filed two separate motions to suppress the evidence seized from his residence. In his first motion, Ritchie alleged deficiencies in the search warrant affidavit. After holding an evidentiary hearing pursuant to Kentucky Rules of Criminal Procedure (RCr) 9.78, the court entered an order denying the motion.

In his second motion to suppress the evidence, Ritchie alleged that the search warrant was issued on the basis of erroneous information and that the officers had

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<sup>2</sup> See Kentucky Revised Statutes (KRS) 218A.1415 and KRS 218A.500, respectively.

acted in bad faith. Following a second evidentiary hearing, the court entered an order denying the motion.

Ritchie subsequently entered a conditional *Alford* plea to the methamphetamine charge (not enhanced) and to the drug paraphernalia charge. The court sentenced Ritchie to 18 months' imprisonment, probated on various conditions for one year. This appeal by Ritchie 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.*

Ritchie first argues that the evidence recovered during the execution of the search warrant should have been suppressed on grounds that the affidavit supporting the warrant was insufficient to establish probable cause. We disagree.

Ritchie maintains that the affidavit signed by Officer Jackson neither specified the year in which the information was received nor specified how or where Ritchie was involved in selling illegal drugs. Ritchie contends that even if the anonymous tip was received in August of 2004 and a “trash pull” was conducted on November 15, the three-month delay renders the search invalid as not contemporaneous with the tip. He further contends that since the tip was stale, the discovery of the evidence did not alone provide probable cause for the issuance of a search warrant.

In support of his argument, Ritchie cites *United States v. Elliot*, 576 F.Supp. 1579 (S.D. Ohio 1984), a case with facts similar to those in this case. In *Elliot*, an officer seeking a search warrant submitted a supporting affidavit stating that “[d]ue to anonymous citizens’ complaints concerning drug activity”, he had conducted a “trash pull” at the defendant’s residence. The court, in granting the defendant’s motion to suppress, found that because the affidavit did not include the dates of the citizens’ complaints, those complaints could not contribute to a basis for determining the existence of probable cause. *Id.* at 1581. The *Elliot* court further held that the discovery of contraband alone was insufficient to support a finding of probable cause. *Id.* Ritchie argues that the same reasoning used in granting the motion to suppress in *Elliot* is equally applicable here.

While the facts of *Elliot* and the present case are similar, the difference is that here the affidavit included a time frame within which the anonymous tip was received. Thus, the “temporal deficiency” of *Elliot* is not present in this case. Furthermore, contrary to the court in *Elliot*, we conclude, as we will explain below, that the successful “trash pull” alone was sufficient to support a finding of probable cause.

Although the anonymous tip information was received three months before the affidavit and search warrant<sup>3</sup>, it was corroborated by the drug-related evidence found during the "trash pull" at Ritchie's residence.<sup>4</sup> *See U.S. v. Spikes*, 158 F.3d 913, 924 (6<sup>th</sup> Cir. 1998) ("where recent information corroborates otherwise stale information, probable cause may be found"). The "trash pull" provides a sufficient nexus between the information received from the anonymous source and Ritchie's residence. Further, a common sense reading of the affidavit leads to a reasonable inference that the tip was received in August of 2004, rather than in some past year.

At any rate, we believe that the evidence seized from the "trash pull" by itself was sufficient to constitute probable cause to support the issuance of the search warrant. Although we have not found any Kentucky cases addressing this issue, as noted in *Bowles v. State*, 820 N.E.2d 739 (Ind.App. 2005), "other courts have held that evidence obtained from a single trash search may be sufficient to establish probable cause." *Id.* at 748. *See also U.S. v. Briscoe*, 317 F.3d 906, 907-08 (8<sup>th</sup> Cir. 2003); *State v. Bordner*, 53 S.W.3d 179, 182 (Mo.Ct.App. 2001); *State v. Johnson*, 531 N.W.2d 275, 279 (N.D. 1995); *State v. Brown*, 484 N.E.2d 215, 219 (Ohio App. 1984).

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<sup>3</sup> 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 simply the number of days that have elapsed. Where the offense in question is ongoing and continuing, 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 significant." *Id.* at 584. Here, the affidavit stated that the affiant had information from an anonymous source that Ritchie "was involved in selling illegal drugs", an activity of an ongoing and continuous nature.

<sup>4</sup> There were apparently several unsuccessful "trash pulls" between the time the officers received the anonymous tip and the successful "trash pull" of November 15, 2004.

Under the totality of the circumstances, substantial evidence supported a finding of probable cause for the issuance of the search warrant.<sup>5</sup> Accordingly, the trial court did not err in denying Ritchie's motion to suppress on this ground.

Ritchie also argues that the evidence should have been suppressed on grounds that the warrant was procured by deliberate falsehood or a reckless disregard for the truth. We disagree.

Ritchie contends that misstatements of fact were made by Officer Jackson in his affidavit regarding the trash can used in the "trash pull." He states that at the hearing on his second motion to suppress, he presented evidence that: (1) his trash can was located at a different site on the day of the trash pull; (2) that he never disposed of personally identifiable mail in the trash; (3) that the mail allegedly found by the officers during the trash pull was actually located on his dresser; and (4) that the testimony of Howard Taylor, a toxicologist, determined that field testing of a marijuana stem will not produce a positive result. Ritchie contends that this evidence shows that Officer Jackson's affidavit, even if valid on its face, was inaccurate, deliberately false, and/or demonstrated reckless disregard for the truth. He thus argues that the motion to suppress should have been granted.

In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667

(1978), the U.S. Supreme Court held:

[w]here 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

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<sup>5</sup> Consequently, we need not address Ritchie's contention that the "good faith" exception is inapplicable to the present case. See *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

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 the 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.

438 U.S. at 155-56. *See also Commonwealth v. Smith*, 898 S.W.2d 496, 503 (Ky.App. 1995).

The officer's testimony at the suppression hearing refuted the contrary evidence presented by Ritchie. Based on that testimony, the record contains ample evidence to support the court's findings. It was for the trial court to judge the credibility of the witnesses and the weight given to the evidence. The court obviously found the evidence presented by the Commonwealth more persuasive and credible than the evidence presented by Ritchie. Accordingly, we find no error in the trial court's denial of the motion to suppress on this basis.

The orders and judgment of the McCracken Circuit Court are affirmed.

LAMBERT, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS BY SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I must dissent from the majority's holding that the trash pull itself was sufficient to make up for the obvious deficiencies in the affidavit used to support the search warrant. The affidavit was insufficient in that the date given for the anonymous tip failed to state what year the tip was conveyed, only the month of August. The trash pull that resulted in the finding of

the evidence of marijuana use occurred some three months later and revealed only some baggies and a single marijuana stem. Apparently other trash pulls disclosed no evidence of illegal drug related activity. At what point does an anonymous tip become too stale to form a basis for an affidavit? I submit that three months of finding nothing renders a tip, without other corroborating evidence, inherently unreliable. Of most importance to my opinion is a line of reasoning set forth in *United States v. Elliot*, 576 F.Supp. 1579, 1581 (S.D. Ohio 1984), a case with very similar facts to the situation at hand. Therein the affidavit noted only that that an anonymous tip of illegal activity was given without specifying the date of the tip, no other corroborating evidence was detailed and a trash pull revealed the presence of partially smoked marijuana cigarettes and stems from marijuana stalks. After finding that the undated tip was insufficient to serve as a basis for the determination of probable cause, the court addressed whether the found evidence was sufficient to support the search warrant.

We conclude that the discovery of the discarded contraband, standing alone, is insufficient to support a determination of probable cause. Despite the prompt action of the agent in seeking the warrant the day after the garbage was examined, the evidence in the garbage did not render the continued presence of marijuana probable. The affidavit does not indicate a large quantity of discarded contraband which might indicate its continued presence in the house. Instead, all we can ascertain is that at least two partially smoked marijuana cigarettes and several stems had left the home at some point in time.

Furthermore, the nature of the evidence is not such that its continued presence in the home is probable. To the contrary, this refuse is merely the waste product of past marijuana use. Moreover, it is unclear when that past use occurred, when the garbage was removed from the house or even when it was scheduled to be picked up. Even assuming weekly garbage collection, the contraband may well have been evidence of marijuana use five days prior to the examination of the



garbage. Without corroboration, we cannot say that this supports a conclusion of the probable presence of contraband on the day of the search.

We can conceive of the argument that the anonymous complaint and the affiant's surveillance, despite their deficiencies, are corroborative of the contraband found in the garbage, and therefore permit the conclusion of the continued presence of contraband. Given the nature of the contraband found in this case, we find this argument unpersuasive. The waste products of marijuana use do not, of themselves, indicate any continuing presence of contraband in the home. As for the complaints and the surveillance, it is difficult to perceive how information which was pertinent perhaps weeks or months before can permit the inference of a current continued presence of contraband, even assuming that such information may have indicated a continued presence at that earlier time. Such conjecture is more appropriate in the discussion of possibilities than it is in the discussion of probabilities.

We are aware of cases in which evidence of drug use discovered in the defendant's garbage contributed to or provided the sole basis for the determination of probable cause. *See United States v. Sumpter*, 669 F.2d 1215 (8th Cir. 1982); *United States v. Reicherter*, 647 F.2d 397 (3d Cir. 1981). However, in *Sumpter* the presence of marijuana in the garbage was accompanied by an anonymous tip received three days prior, and the hearsay statements of the garbage carrier that on the day of the garbage search, several cars had made short stops at the defendant's home during the time it took to collect the refuse in the alley.

*Reicherter* is somewhat more instructive for the purposes of this case. There, probable cause rested entirely on the evidence found in the defendant's garbage. However, the evidence was collected on three separate occasions, thus indicating a continuing presence of contraband in the defendant's home. Significantly, the instant case involves a single search of the defendant's garbage, an examination that yielded perhaps a small amount of discarded marijuana cigarettes and stems. We do not think that such evidence of a single instance of past use, even in the immediate past, renders the continued presence of contraband reasonably probable.

*Id.* at 1581-1582.

Given 1) the lack of temporal certainty in the anonymous tip, 2) the lapse of time between the tip and the trash pull (even if the tip is assumed to have been conveyed in the same year as the trash pull), 3) the minimal nature of the evidence found, 4) the lack of information about when the trash was placed outside the home to be picked up, and 5) the dearth of other corroborating evidence, I cannot agree that the affidavit was in any way sufficient to support the issuance of a search warrant. I would suppress the evidence.

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