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Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-002391-MR

JESSE DAVIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 06-CR-00483

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

MOORE, JUDGE: Jesse Davis entered a conditional guilty plea to one count of possession of drug paraphernalia, reserving the right to appeal from the Fayette Circuit Court's denial of his motion to suppress evidence seized after the execution of a search warrant. On appeal, Davis challenges both the validity and sufficiency of the affidavit in support of the warrant. Finding that the affidavit contained sufficient information to support a finding of probable cause, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 26, 2006, Detective Ford of the Lexington Police Department sought a warrant to search 148 Alabama Avenue, which was occupied by the appellant, Jesse Davis, and Linda Johnson, and to search Damine Green's vehicle, an allegedly maroon Chevrolet Caprice Classic. In the affidavit in support of the search warrant, Detective Ford stated the following:

On the 25 day of August 2004 at approximately 9:00 PM, affiant received from a qualified confidential informant [CI] that Damine Green, "Chops" was selling crack cocaine from residences on Alabama Avenue.

On/about January 11, 2006 a different qualified confidential informant advised that subjects were selling crack cocaine from within 148 Alabama Avenue. The CI stated that the people who lived in the house w[e]re known as "Jesse" and "Linda." The CI advised that different subjects would utilize the residence to sell crack cocaine and that "Jesse" and "Linda" allowed the activity to occur.

The CI advised that one of the subjects who is known to sell crack cocaine from within 148 Alabama Avenue is known as "Chops." The CI stated that he/she thought that "Chops'" real name was "Damien" but did not know his last name. However, the CI advised that "Chops" owned/operated a maroon Chevrolet Caprice Classic with no visible license plate. The CI stated that when the Caprice is parked near 148 Alabama Avenue, "Chops" is at the residence selling crack cocaine.

Within the past 48 hours, affiant met with the second CI for the purpose of conducting a controlled purchase of crack cocaine from within 148 Alabama Avenue.

The CI who provided the information contained in this affidavit has provided information to the narcotics unit on multiple occasions. The CI has also purchased narcotics on behalf of the police department on multiple occasions. The CI has demonstrated truthfulness and accuracy and the information has been verified via independent investigation.

To corroborate the information he received from the second CI, Detective Ford claimed in his affidavit that he conducted the following independent investigation:

On/about August 2004, affiant received information from a different qualified confidential informant that "Chops" was selling crack cocaine around Alabama Avenue. Affiant inquired as to "Chops'" real identity and was advised by the CI that his name is really Damine Green.

On/about January 16, 2006 detectives from the narcotics unit conducted surveillance at 148 Alabama Avenue to verify the information from the second CI. At approximately 1545 hours, detectives observed a vehicle drive to and park near the curb in front of 148 Alabama Avenue. The car was occupied by two people. The driver of the vehicle, Sidney Maxberry, got out of the car and ran into the residence while the passenger, later identified as Kim E. Davis, Jr., stayed in the vehicle. After a few moments, Maxberry ran back out of 148 Alabama Avenue and assumed his role as the driver of the vehicle. Detectives noticed that the license plates on the vehicle were expired and called for assistance from Officers Marlin and Eckhardt who were in the area conducting patrol duties. The officers located the vehicle and conducted a traffic stop. Because detectives had observed suspicious activity occurring at an alleged drug house, the officers requested assistance from a narcotics detection canine (drug dog). The dog alerted to the presence of narcotics within the vehicle and the officers searched it. Officers were able to locate the following items of contraband: Approximately 6g of crack cocaine, approximately 1g of marijuana, \$780 in US currency, and two (2) handguns. Davis claimed responsibility for all items and was subsequently arrested and criminally charged.

Within the past 48 hours detectives conducted surveillance at 148 Alabama Avenue and observed a maroon Chevrolet Caprice Classic sedan parked on the street near the residence. The CI advised that when that vehicle is parked near 148 Alabama Avenue, "Chops" is selling crack cocaine from within the residence.

In addition to the information set forth above, Detective Ford provided an attachment explaining allegedly exigent circumstances to support his request that the

warrant be a “no knock” warrant. In the attachment, the detective stated the following: 1) he believed that the amount of crack cocaine inside 148 Alabama Avenue was of such a size that it could be easily discarded; 2) he suspected that Green had been an accessory to an incident of assault in the first degree; and 3) he had discovered that there was an active arrest warrant for Green.

Besides the above mentioned information, Detective Ford stated in the attachment to the affidavit that, 48 hours before seeking the search warrant, he met with the second CI to conduct a controlled drug buy of crack cocaine from Green from within 148 Alabama Avenue. According to the affidavit, Detective Ford initially searched the CI for contraband and found none. After searching the CI’s person, the police provided buy money to the CI and escorted the CI to the residence. In the affidavit, Detective Ford stated that he observed the CI enter and exit the residence. Afterwards, the police escorted the CI to a predetermined meeting place where the CI surrendered the alleged drugs. Additionally, Detective Ford stated in the affidavit that, during the controlled drug buy, the police observed a maroon Chevrolet Caprice Classic parked on the street near 148 Alabama Avenue.

Based on the information contained in the affidavit, a Fayette County District Court Judge found probable cause and issued, on January 26, a search warrant for 148 Alabama Avenue. After the search warrant was issued, the police proceeded, on January 27, to the residence to execute the warrant. Upon arrival, the police found Green outside the residence and immediately arrested him. After the police arrested Green, they entered 148 Alabama Avenue and executed the search warrant. At that time, the police learned that Davis lived there. As a result of searching the premises, the police found

various items of drug paraphernalia in a bedroom. Davis claimed ownership of the items, and the police arrested him for possession of drug paraphernalia.

Subsequently, Davis was charged, by indictment, with one count of possession of drug paraphernalia, second or subsequent offense. After Davis was charged, he moved the Fayette Circuit Court to suppress the evidence discovered pursuant to the search warrant. While Davis raised numerous claims of error regarding the search warrant, he argued that the affidavit in support of the warrant lacked probable cause.

After Davis filed his motion, the trial court held a suppression hearing to resolve the issue. At the suppression hearing, the Commonwealth presented Detective Ford as its witness. Detective Ford testified to the facts and circumstances that led to the issuance of the search warrant; however, we will not set forth the entirety of his testimony. Instead, we will focus only on those portions that are pertinent to this appeal.

During cross-examination, Davis questioned the detective regarding the confidential informants mentioned in the affidavit. Detective Ford explained that the affidavit mentioned two confidential informants. One CI contacted the detective in August 2004, and the second contacted him on January 11, 2006. Regarding the second CI, whose information formed the basis of the affidavit, Detective Ford explained that he had not worked with the second CI before, but the detective claimed that the second CI had been previously involved in more than six controlled drug buys and had worked with other police officers. During the hearing, the detective revealed that the maroon Chevrolet Caprice Classic was in reality a maroon Chevrolet Impala. Regarding this vehicle, Davis specifically asked the detective if the second CI had told the detective, on

January 11, 2006, that if a maroon Chevrolet was parked in front of 148 Alabama Avenue, then Green would be there selling drugs. Detective Ford responded yes.

After the detective testified, Davis called Timothy Griffin to testify. According to Griffin, he worked at B&R Auto as a salesman. Griffin attested that, on January 21, 2006, he sold a maroon Chevrolet Impala to Green. During this testimony, Griffin produced a sales document dated January 21, 2006 reflecting the sale. Griffin explained that on that day, Griffin came into the dealership, test-drove the car and, subsequently, bought it. When asked if it were possible that Green could have possessed the car before January 21, 2006, Griffin responded that it was impossible. In response to questioning, Griffin attested that he first met Green on January 21 when he sold Green the car and that he did not know Green personally.

After the presentation of the testimony, Davis focused on the fact that Griffin's testimony contradicted both Detective Ford's testimony and the information contained in the affidavit that the CI told the detective, on January 11, that Green was driving a maroon Chevrolet. Based on this discrepancy, Davis argued that the CI lied about the car and insisted that the accuracy of all the information supplied by the second CI was suspect.

In addition to questioning the accuracy of the second CI's information, Davis questioned the detective regarding the incident involving Sidney Maxberry on January 16, 2006. According to the affidavit, Detective Ford included that in the affidavit as an example of independent investigation which allegedly corroborated the second CI's information. At the hearing, Detective Ford confirmed the information in the affidavit that police observed a car driven by Maxberry, with Kim Davis as the passenger,

stop in front of 148 Alabama Avenue. Furthermore, the police observed Maxberry exit the car, enter the residence, quickly leave the residence, re-enter the car and drive away. Detective Ford confirmed that the police subsequently stopped the car, searched it and found drugs, cash and handguns. The detective also confirmed that Maxberry, the individual who entered the house, was not charged because Kim Davis claimed responsibility for the contraband. Davis noted that, in the affidavit, Detective Ford had mentioned “suspicious activities” and asked the detective if he meant that Maxberry had been involved in a drug transaction while inside 148 Alabama Avenue. The detective responded that there was no proof of that. Davis then asked the detective to explain his reason for including this incident in the affidavit. Detective Ford explained that he included it to support the need for a “no knock” warrant because the incident demonstrated that the house was associated with guns and drugs.

Davis questioned Detective Ford regarding the controlled drug buy mentioned in the affidavit. At the hearing, Detective Ford explained, during the controlled drug buy, the CI did not wear a wire nor did he record the transaction. In response to Davis’s questioning, the detective admitted that he did not record the buy money’s serial numbers. Moreover, he admitted that he did not field test the drugs obtained by the CI nor did he send them to the Kentucky State Police’s forensic laboratory to be tested. However, despite those irregularities, Detective Ford explained that he searched the CI’s person prior to the buy, and the CI had no contraband on his person. The detective attested that he personally observed the CI enter the residence at 148 Alabama Avenue, without stopping anywhere else. The detective then explained that he personally observed the CI leave the house and return to him, without stopping

anywhere else. Detective Ford made it plain that, after exiting the house, the CI had drugs but no buy money.

At the hearing, Davis stated on the record that the affidavit appeared to be sufficient on its face, but he argued that a facially sufficient affidavit could be attacked if it was demonstrated that it contained intentionally or recklessly false statements. Davis argued that, if so, then the affidavit must be purged of the false information and re-evaluated to determine if the remaining information was sufficient to support a finding of probable cause. According to Davis, the information supplied by the second CI was either intentionally or recklessly false. He insisted that without that information the affidavit did not support a finding of probable cause.

Further, in response to Detective Ford's testimony, Davis argued that the trial court should ignore the information found in the affidavit regarding the controlled drug buy. According to Davis, the controlled drug buy was not carried out correctly and was, thus, suspect. Davis also argued that the trial court should ignore the information in the affidavit regarding the Maxberry incident. Davis pointed out that Maxberry had not been charged with any crime even though he entered the house. Because he was not charged, Davis insisted that the information was irrelevant.

After the hearing, the trial court entered a brief order resolving Davis's suppression motion. The trial court found "that the alleged deficiency in the search warrant regarding the automobile was properly explained by the testifying detective and counsel for the Commonwealth." The court also found that the warrant did not violate Davis's constitutional rights "as the warrant could be consistently read with the evidence

presented at the hearing.” Based only on these two findings, the trial court denied Davis’s motion to suppress.

After the trial court denied Davis’s motion, he entered a conditional plea to possession of drug paraphernalia and was sentenced to serve one year in prison; however, the trial court probated that sentence for a period of three years.

II. STANDARD OF REVIEW

When we review suppression issues, we initially examine the trial court’s findings of fact to determine if they are supported by substantial evidence. If so, then the findings are conclusive. Then we review *de novo* the trial court’s application of the law to the facts. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002).

III. ANALYSIS

In his brief, Davis challenges the validity and sufficiency of the affidavit. Citing *Commonwealth v. Smith*, 898 S.W.2d 496, 503 (Ky. App. 1995), Davis argues that a criminal defendant may challenge a facially valid warrant if he proves by a preponderance of the evidence that the affiant, with knowledge and intent or with reckless disregard for the truth, included false statements in the affidavit for a search warrant. If the defendant establishes this, then the reviewing court must purge the false statements from the affidavit and re-evaluate the affidavit to determine if the remaining information was sufficient to establish probable cause. Davis insists that he proved at the suppression hearing that Detective Ford included reckless misrepresentation in the

affidavit regarding Green's maroon vehicle because Tim Griffin's testimony contradicted both Detective Ford's testimony and the information in the affidavit about Green and his vehicle.

In addition to arguing about the false statements regarding Green's vehicle, Davis claims that Detective Ford's independent investigation failed to properly corroborate the information given by the confidential informants. According to Davis, Detective Ford never ascertained that he actually resided at 148 Alabama Avenue. Detective Ford only discovered that a "Jesse" and a "Linda" lived there. Moreover, the detective failed to investigate whether Davis was actually present in the house when the drug buys occurred. Besides that, Davis argues again as he did before the trial court that the controlled drug buy was incorrectly conducted. Additionally, Davis asserts once more that the information regarding the Maxberry incident was irrelevant and should not have been included in the affidavit because Maxberry, who entered the house, was not charged with any crime.

At the hearing, the Commonwealth argued in its closing statement, that it was not clear from the affidavit that the second CI told Detective Ford on January 11 that Green drove a maroon Chevrolet and that when it was parked near 148 Alabama Avenue, Green was there selling drugs. The Commonwealth speculated that the CI might have told this to the detective after Green had purchased the car, and the Commonwealth even claimed that Detective Ford's testimony reflected this. However, this was not so. On the contrary, Detective Ford attested that on January 11, 2006, ten days prior to Green's purchase of the maroon Chevrolet, the CI told him about Green's maroon car.¹ Despite

¹ In fact, despite the fact that the detective was present during the entirety of the hearing, the Commonwealth never attempted to elicit testimony from the detective that would support its speculation.

this, the trial court found “that the alleged deficiency in the search warrant regarding the automobile was properly explained by the testifying detective and counsel for the Commonwealth.” The record does not support this finding. The detective’s testimony did not explain away the discrepancy between the information contained in the affidavit about Green’s car and the testimony from Tim Griffin. Furthermore, while the Commonwealth speculated that the CI might have told this information to the detective after January 21, there is no evidence in the record to support this speculation. And, of course, the Commonwealth’s speculation in its closing argument does not constitute evidence. *See Wheeler v. Commonwealth*, 121 S.W.3d 173, 180 (Ky. 2003) (while wide latitude is allowed in opening and closing statements, they are not evidence). Thus, the trial court could not rely upon it to support its finding. Therefore, the trial court’s finding was clearly erroneous due to the fact that it was not supported by substantial evidence. Because the finding was erroneous, it is not conclusive and we are not bound by it. *See Neal*, 84 S.W.3d at 923.

Davis is correct that a facially sufficient affidavit may be attacked if shown to contain intentionally or recklessly false statements. *Guth v. Commonwealth*, 29 S.W.3d 809, 810 (Ky. App. 2000). After reviewing the suppression hearing, we are convinced that Davis established that the affidavit contained intentionally or recklessly false statements regarding Green and his vehicle. The trial court should have purged any information received from the second CI from the affidavit and should have re-evaluated the remaining information to determine if it supported a finding of probable cause. *Id.*

Concluding that the information obtained from the second CI regarding Green and his car should have been purged, we turn to the remaining information set

forth in the affidavit. In the affidavit, Detective Ford included the Maxberry incident as an example of independent investigation that corroborated the CI's information.

However, at the hearing, the detective unequivocally testified that he included it to support his request for a "no knock" warrant. Moreover, while Detective Ford attested that this incident showed that the house was associated with drugs and guns, he testified that it was not proof of a drug transaction. Given Detective Ford's testimony, the Maxberry incident was not included in the affidavit to establish probable cause or corroborate the information supplied by the second CI. Considering this, we conclude that this information was not sufficient to support a finding of probable cause.

With this conclusion, we next consider the information from the first CI that Green was selling crack cocaine from residences located on Alabama Avenue. Obviously, this information does not establish probable cause because 1) it does not demonstrate a specific connection between Green's illegal activity and 148 Alabama Avenue and 2) it was too remote in time, being over one year old at the time the detective sought the search warrant.

Discounting this information, we are left with the information regarding the controlled drug buy. Davis fervently believes that this controlled drug buy was not properly conducted. However, he cites neither case law nor statute to support this belief. Additionally, he presented no evidence at the suppression hearing that would undermine the validity or sufficiency of this information. Turning to the record, we find that Detective Ford testified that he met with the second CI, searched him and found no contraband. He then gave buy money to the CI and observed him enter the house at 148 Alabama Avenue, without stopping anywhere else along the way. Detective Ford then

observed the CI leave and return to the detective, without stopping anywhere else along the way. The detective attested that, after leaving the residence, the CI had drugs but no buy money. Clearly, one could easily infer from this evidence that the CI was involved in an illegal drug transaction while inside 148 Alabama Avenue. This information was sufficient to support a finding of probable cause.

Although the trial court's finding regarding Green's vehicle was clearly erroneous, the trial court's finding that Davis's constitutional rights were not violated was correct given that the information about the controlled drug buy supported a finding of probable cause. Thus, we are convinced that the trial court correctly denied Davis's suppression motion even though it did so for the wrong reasons. *See Entwistle v. Carrier Conveyor Corporation*, 284 S.W.2d 820, 822-823 (Ky. 1955); *see also Vega v. Kosair Charities Committee, Inc.*, 832 S.W.2d 895, 897 (Ky. App. 1992) (an appellate court may affirm a lower court's decision if the lower court came to the correct conclusion based on the wrong reason).

Davis's judgment of conviction and the order of the Fayette Circuit Court denying Davis's motion to suppress are affirmed.

COMBS, CHIEF JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

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