

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000476-MR

ANDREA MORRIS JOHNSON

APPELLANT

v. APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE DAVID JERNIGAN, JUDGE
ACTION NO. 06-CR-00045

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR AND THOMPSON, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Pursuant to her conditional guilty plea, Andrea Morris Johnson was convicted in the McLean Circuit Court of first-degree possession of a controlled substance and possession of drug paraphernalia and was sentenced to a term of imprisonment. The charges resulted from evidence of illegal drugs and drug

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 KRS 21.580.

paraphernalia that was seized after a search, pursuant to a search warrant, of a residence where Johnson resided.

Before entering her conditional guilty plea, Johnson filed a motion to suppress the evidence, which was denied by the trial court following an evidentiary hearing. Johnson then entered a conditional guilty plea to the charges, and the court sentenced her to three years in prison. The conditional guilty plea reserved her right to appeal the court's order denying her suppression motion. We find no error and thus affirm.

In *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky.App. 2002), this court stated the standard of review in cases of this nature as follows:

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on these findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law.

Id. at 923.

The first issue presented in this appeal is whether the affidavit accompanying the search warrant supported a finding of probable cause to search the Johnson residence. *See* U.S. Const. Amend. IV. If it did, then the warrant was valid. If it did not, then the issue is whether the good faith exception applies.

The affidavit accompanying the search warrant was signed by McLean County Sheriff Frank Cox. On the first page of the affidavit, the address and specific

location of the Elmer Johnson residence is described. Sheriff Cox stated on the second page as follows:

On November 6th, 2006, at approximately 9 a.m., Affiant received information from Charles Payne, Deputy Sheriff, to the effect that an interview with one Randall E. Johnson who resided at Lot # 103, Livermore Trailer Park, located in the city limits of Livermore off of Highway 431, Randall E. Johnson has advised Officer Payne that within the last 4 to 7 days he had purchased ½ gram of crystal meth from Elmer Johnson. The purchase price was \$50.00. Randall Johnson could not be more specific about the date of the purchase because he stated he had been passed out for one to three days. Randall Johnson further stated that Elmer Johnson showed him what Elmer Johnson claimed was a one ounce bag of crystal meth, in addition to the amount being purchased by Randall Johnson. Randall Johnson further advised that he had purchased methamphetamine from Elmer Johnson on at least three occasions within the last month. Randall Johnson stated that he had purchased methamphetamine from Elmer Johnson approximately 5 days prior to his most recent purchase, at that time he was told to be quiet because there was a child asleep. Additionally, he saw a male child approximately 7 years of age playing in the yard. Each time that Randall E. Johnson purchased methamphetamine from Elmer Johnson, Randall Johnson states that there was a woman present who's last name was Morris. Acting on the above information, the Affiant contacted Jennifer Morris of Cabinet for Health and Family Services, who verified that a woman by the name of Andrea Morris was currently living with Elmer Johnson. Jennifer Morris is no relation to Andrea Morris. Jennifer Morris further advised that Andrea Morris had a 2 year old female child. Affiant believes from his personal knowledge that Elmer Johnson has a son approximately 7 years old.

In addition to the foregoing, the McLean County Sheriff Office received information on November 2nd from Courtney Daugherty that Elmer Johnson was a person who supplied her with methamphetamine. It is noted that Courtney Daugherty had made a recent buy from John and Jessica DeYoung. A

search of the DeYoung residence revealed a large quantity of methamphetamine.

In addition to the foregoing, during the last 3 years and 10 months, myself and my office have received numerous citizens' complaints alleging drug trafficking at the Johnson residence. At different times over the last 4 years, I and my deputies have conducted surveillance on the Johnson residence and observed a very high volume of traffic that largely consisted of known methamphetamine users.

Johnson argues on appeal that the affidavit was insufficient to establish probable cause. First, she notes that it did not reveal the location where any of the drug purchases between either Randall Johnson or Courtney Daugherty and Elmer Johnson had occurred. Second, the primary informant, Randall Johnson, admitted he had been passed out for an indeterminate period of time and did not recall the specific date the latest drug transaction between Elmer Johnson and him had occurred. Third, the affidavit failed to disclose to whom the secondary informant, Courtney Daugherty, revealed her information and also failed to disclose where or when she engaged in drug transactions with Elmer Johnson.

In determining whether to issue the search warrant, the reviewing magistrate was required to determine whether the supporting affidavit contained probable cause to search the residence. *See Beemer v. Commonwealth*, 665 S.W.2d 912, 915 (Ky. 1984). In *Lovett v. Commonwealth*, 103 S.W.3d 72 (Ky. 2003), the Kentucky Supreme Court stated:

[t]he 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 77, quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). When reviewing a search warrant affidavit, the magistrate may make reasonable inferences in determining the probability of whether evidence of a crime will be found in a particular place, including where such evidence may be found. *Id.* at 80.

Here, the court stated as follows:

The Defendant is correct in her assertion that the affidavit fails to clearly specify that Randall Johnson saw and purchased methamphetamine at the residence of Elmer Johnson, also being the residence of the Defendant. However, this Court is required by law to consider the four corners of the affidavit to determine from the totality of the circumstances whether or not probable cause has been established. In the case at bar, it is clearly inferred from the allegations contained in the affidavit that the events occurred at the residence of Elmer Johnson. First and foremost, the residence of Elmer Johnson was specifically described as to location and type of structure, and the persons to be searched are named. Defendant does not argue otherwise. The affidavit further refers to the purchase of methamphetamine from Elmer Johnson at a time when a female whose last name was Morris was present, that a child was asleep nearby, and a seven year old child was playing in the yard. Significantly, the affidavit further details that Sheriff Cox, being the affiant, contacted the Cabinet for Health and Family Services who verified that the Defendant had a two year old female child. The affidavit further stated that Sheriff Cox knew from his own personal knowledge that Elmer Johnson had a son approximately seven years old. Accordingly, the affidavit is sufficient in which to establish probable cause that the residence of Elmer Johnson would contain evidence of a crime.

The determination of probable cause by the reviewing magistrate “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.’” *Lovett*, 103 S.W.3d at 78, *quoting Gates*, 462 U.S. at 236, 103 S.Ct. at 2331.

Although the affidavit does not directly state that the drug transaction between Randall Johnson and Elmer Johnson occurred at Elmer's Johnson's residence, such clearly may be inferred from the facts that were set forth therein. Further, the affidavit specifically describes the Elmer Johnson residence and its location. Regarding Johnson's assertion that Randall Johnson could not state with absolute certainty the date that he had made the latest drug purchase from Elmer Johnson, he did state that it was within four to seven days prior to giving the information to the officers. As Johnson does not raise the issue of staleness, we find no error in this regard. Finally, regarding Johnson's contention that the information from Daugherty in the affidavit does not reveal when or where she purchased drugs from Elmer Johnson, we note that such information was not necessary to the determination of probable cause and was only information to add credence to the information provided by Randall Johnson.

We conclude that the trial court correctly determined that the affidavit was sufficient to establish probable cause to search the Johnson residence. Thus, the court's denial of Johnson's suppression motion was not error.

Johnson also argues that the officers' good faith reliance on the search warrant and supporting affidavit was not reasonable pursuant to the standards elicited in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Having upheld the validity of the search warrant, the issue of good faith is moot.²

The judgment of the McLean Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Donna M. Dant
Calhoun, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

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ORAL ARGUMENT FOR APPELLEE:

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² In addition to upholding the validity of the search warrant, the trial court further determined that the officers had acted in good faith in procuring the warrant and in relying on its validity. Thus, the court held that “the good faith exception does apply in this case.” Because the court had upheld the validity of the warrant, any ruling on the applicability of the good faith exception was unnecessary.