

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2005-CA-002503-MR

RANDALL TURNER

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE LARRY MILLER, JUDGE  
ACTION NO. 03-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON AND KELLER, JUDGES.

ACREE, JUDGE: Randall Turner (Appellant) appeals from a judgment of the Breathitt Circuit Court finding him guilty of multiple counts of possession of a controlled substance and tampering with physical evidence, and sentencing him to ten years' imprisonment. On appeal he argues that the affidavit requesting the search warrant of his home was constitutionally deficient and that the Commonwealth introduced insufficient evidence to support the charges against him. We disagree and affirm the trial court.

Breathitt County Sheriff John Turner (no relation to Appellant) completed an affidavit for a search warrant recounting the following information received on November 6, 2002:

Sheriff Turner took a written statement from Breathitt County resident Patricia Lipps. Ms. Lipps stated that she has witnessed Randy Turner purchase and sale (sic.) illegal drugs at his residence. She has witnessed large amounts of cocaine, marijuana and Oxycontin within the last week. Ms. Lipps further stated that Mr. Turner was getting a "load" in on November 7<sup>th</sup> in the morning.

In addition, Sheriff Turner stated his office had received numerous calls from local residents informing him Appellant was dealing illegal drugs at his home. The warrant was granted by the district judge and executed the following day. Officers recovered methamphetamine, hydrocodone, clonazepam, alprozalam, diazepam, various items of drug paraphernalia and a torn plastic baggie with cocaine residue.

Appellant was indicted and charged with first-degree possession of a controlled substance, second-degree possession of a controlled substance, multiple counts of third-degree possession of a controlled substance, possession of marijuana, possession of drug paraphernalia, and tampering with physical evidence. He filed a motion to suppress the evidence against him arguing that the affidavit supporting the search warrant failed to provide probable cause. The trial court conducted a hearing and asked for legal memoranda from counsel. Afterwards, the suppression motion was denied and the case proceeded to trial. Appellant was convicted and sentenced to ten years' imprisonment. This appeal followed.

Appellant first argues the trial court erred in denying his request to suppress the evidence seized at his residence on November 7, 2002. He contends the affidavit presented to the judge who signed the search warrant was insufficient to give rise to probable cause to search his property. Appellant points to the affidavit's failure to specify that Lipps was a reliable informant. He also claims Lipps' statement to Sheriff Turner did not provide enough detail to establish probable cause. We disagree.

The Kentucky Supreme Court has already considered the issue of challenges to search warrants, based on lack of probable cause, where “the affidavit upon which the finding of probable cause was based did not describe the informant's reliability, veracity, and basis of knowledge[.]” *Lovett v. Commonwealth*, 103 S.W.3d 72, 77 (Ky. 2003).

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.

*Lovett*, 103 S.W.3d at 77-78. Lipps stated that she had personally seen Appellant dealing drugs in his home. Further, she named several specific illegal substances (cocaine, marijuana, and Oxycontin) which she had seen at Appellant's within the past week. Finally, she related that Appellant was actually expecting additional drugs to be delivered to him the following day.

“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.’” *Lovett*, 103 S.W.3d at 78 (citation omitted.) We are aware that the affidavit failed to indicate Lipps' credibility as an informant. Nevertheless, her personal observation of Appellant's illegal behavior and her knowledge of the details of his drug dealing, as set forth in the affidavit, supported the district's judge's determination that probable cause existed to issue a search warrant.

Appellant also contends the Commonwealth introduced insufficient evidence at trial to convict him of drug possession and tampering with physical evidence. Several officers were present at Appellant's house to execute the search warrant. Trooper Dan Smoot, who did not know Appellant by sight, was approaching Appellant's home in an unmarked car when he saw a man standing inside in front of a bay window. After parking his vehicle, Smoot went around to the back of the house where he met the same man coming out the back door. Smoot asked the man whether Turner was at home, and

the man answered that he did not know. Smoot proceeded inside through the back door and announced that he had a search warrant. He found three people in the front room of the home.

After Smoot went inside, the man exiting the home through the back door started running away from the house and Lieutenant Keith Napier immediately pursued him. Napier was joined by two deputies from the Breathitt County Sheriff's office. The man ran down a hill before the officers caught him, taking him to the ground. The man was identified as Appellant Randall Turner. Smoot left Sheriff Turner in charge of the people inside the house and proceeded to the spot where Appellant Turner had been apprehended. Smoot found a torn plastic baggie with white residue lying at Appellant's feet. The end of the baggie had been ripped open, and there was white powder a few inches away from the baggie on the ground.

Smoot returned to the house with Appellant and searched the three people in the front room. Two were visitors, and the third was Appellant's wife. Near the bay window, within reach of the spot where Appellant had been standing when Smoot first saw him, was a duffel bag containing pills in bottles. Napier found two bags of marijuana on the entertainment center in the front room. A deputy found three pink pills and a bag of methamphetamine next to a chair near the bay window. The remaining pills were all located inside the duffel bag. At trial, a chemist from the State Police Laboratory in London, Kentucky, testified that the torn plastic baggie found at

Appellant's feet tested positive for cocaine residue. The powder on the ground nearby was too dispersed to be collected and tested.

Appellant argues the evidence at trial was insufficient to establish his possession of the drugs inside his residence or that he acted to conceal or destroy the cocaine in the plastic baggie prior to his arrest. The Kentucky Supreme Court has previously articulated the test for the appropriateness of a directed verdict.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

*Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citation omitted).

Appellant contends the evidence at trial was insufficient to prove that he knew or should have known illegal drugs were present in his home. Further, he points out that three other people were present inside the home when the drugs were found.

Proof of actual possession of a controlled substance is unnecessary in order to obtain a conviction. *Hargrave v. Commonwealth*, 724 S.W.2d 202, 203 (Ky. 1986). Rather, constructive possession may be shown by establishing that contraband was subject to a defendant's dominion or control. *Id.* at 202. In addition, “the general rule

relating to the possession of dangerous drugs is that the possession need not be exclusive. Two or more persons may be in possession of the same drug at the same time and this possession does not necessarily have to be actual physical possession.”

*Franklin v. Commonwealth*, 490 S.W.2d 148, 150 (Ky. 1972).

Constructive possession has been found where officers found drugs in the kitchen, living room, and one bedroom of an apartment, even though the defendant was a visitor from Detroit rather than a resident. *Houston v. Commonwealth*, 975 S.W.2d 925, 927 (Ky. 1998). We have also upheld a jury verdict of constructive possession where the defendant disclaimed any knowledge of cocaine found in the kitchen and bathroom of her home, even after a visiting relative claimed that the cocaine belonged to him and was for his personal use, not for sale. *Clay v. Commonwealth*, 867 S.W.2d 200, 202 (Ky.App. 1994).

Smoot testified that the duffel bag containing pills and pill bottles would have been within Appellant's reach when he was standing in front of the bay window as police officers arrived to execute the search warrant. Appellant makes much of the fact that his wife was sitting in the chair closest to where the methamphetamine was found and that the other two people in the house could have dropped or thrown drugs down after he left the house. Nevertheless, as the *Hargrave*, *Franklin*, *Houston*, and *Clay* cases make clear, Appellant was not entitled to a directed verdict merely because other people inside his house could have been in possession of some of the drugs found during the search.

Appellant points out that mere ownership of real property is not enough to sustain a finding of constructive possession of drugs located on that property. *Franklin*, 490 S.W.2d at 148. While this is true, the facts of Appellant's case are significantly different than those in *Franklin* where the illegal drugs were concealed in a barn some distance away from the house. In that drug possession prosecution of a husband and wife, the Commonwealth was able to connect the husband to the barn because he was a farmer and regularly used the barn. The wife, however, was a school teacher whose only tie to the barn was that her name was on the deed showing joint tenancy of the real property. In this case, Appellant was observed standing within reach of most of the illegal drugs found in his home immediately prior to Smoot's entry and announcement of a search warrant. The other drugs were found in plain sight. Considering all facts in the light most favorable to the Commonwealth, a reasonable juror could have believed, beyond a reasonable doubt, that Appellant exercised control or dominion over the drugs found during the search of his home. Since it was not clearly unreasonable for the jury to find him guilty, the trial court's decision denying his request for a directed verdict must be upheld. *Benham*, 816 S.W.2d at 187.

Finally, we examine Appellant's claim that he was entitled to a directed verdict on the charge of tampering with physical evidence. Kentucky Revised Statute (KRS) 524.100 reads, in relevant part,

(1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:



(a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

Appellant argues there was insufficient evidence to support that charge that he committed this offense because no one saw him take any action with respect to the baggie of suspected cocaine found near him at the time of his arrest. The evidence in this case showed that Appellant was standing in front of a bay window when Smoot pulled up in front of the house. By the time Smoot got out of his car and walked around to the back door, Appellant was leaving the house. He then proceeded to deny his identity and ran from pursuing officers before being caught at the bottom of a hill. When Appellant was arrested, officers found an empty plastic baggie at his feet. The baggie, which had a corner ripped out of it, tested positive for cocaine residue. White powder spilled on the ground five or six inches from the baggie was too dispersed to collect and test.

In *Commonwealth v. Henderson*, 85 S.W.3d 618 (Ky. 2002), the Kentucky Supreme Court reversed the Court of Appeals after we held that hiding cash taken during a robbery inside the insole of a shoe was insufficient to sustain a conviction under KRS 524.100(1)(a). The Supreme Court noted

The Court of Appeals distinguished *Burdell v. Commonwealth* [990 S.W.2d 628 (Ky. 1999)] and *Taylor v. Commonwealth* [987 S.W.2d 302 (Ky. 1998)] from the present case because Appellee concealed the evidence on his person instead of some other location. The Court of Appeals held that in those cases the defendants were trying to “disrupt the investigatory process by attempting to separate themselves from incriminating evidence.”

*Henderson*, 85 S.W.3d at 619. The Court went on to note that the investigatory process includes police chases. *Id.* at 619-20. The presence of an illegal substance in such close proximity to Appellant Turner at the time of his arrest was sufficient to support the jury's conclusion that he was in possession of the baggie and its erstwhile contents. Further, the white powder scattered within a few inches of the baggie strongly suggests that Appellant, aware of his imminent arrest, attempted to prevent the pursuing officers from recovering enough of the substance to verify its illicit nature. Since the jury could have reasonably concluded that Appellant violated KRS 524.100(1)(a), the trial court correctly denied the directed verdict request.

For the foregoing reasons, the judgment of the Breathitt Circuit Court is affirmed.

ALL CONCUR.

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