

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000026-MR

DALLIS WAYNE ABNEY

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 11-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: STUMBO, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Dallis Wayne Abney appeals from his final judgment based on the denial of his motion to suppress.

On the evening of August 29, 2011, Powell County Sheriff's Deputy Matt Reed received reports from a fellow officer that a vehicle was being driven erratically. He located and followed the vehicle and observed it crossing the

shoulder and center line several times. Suspecting the driver was impaired, he conducted a traffic stop. Eighteen-year-old Cody Abney was driving the vehicle and his father, Abney, was a passenger. Reed smelled a marijuana odor in the car. Reed asked Cody and Abney to exit the car and produce their licenses. Cody did not have a valid license. When Abney reached into his pants pocket for his license, he pulled out his license and a roll of cash along with flakes of a substance Reed believed to be marijuana. Reed arrested Abney for marijuana trafficking and took both Abney and Cody to the Powell County Sheriff's Office.

Abney and Cody were interviewed separately and their interviews were not recorded. Cody told Reed he lived with Abney and had seen marijuana at their home. Cody told Reed about the presence of between ten and twenty pounds of marijuana at the home. The parties dispute whether his statement implied that quantity being there currently or at sometime in the past. Cody did not specifically tell Reed when he observed it.

Because Abney lived in Estill County, the Kentucky State Police were assigned to obtain the search warrant. On August 30, 2011, shortly after midnight, KSP Trooper Brewer met with Reed and spoke to Cody on the phone. Brewer immediately filed an affidavit for a search warrant based upon his conversations with Reed and Cody, which contained the following statements:

The affiant was contacted by Deputy Matt Reed of the Powell County Sheriff's Department. Deputy Reed indicated that during a traffic stop in Powell county he observed a strong smell of marijuana in a vehicle owned by Dallis Abney. He observed marijuana mixed in with

money that Dallis Abney had pulled from his pant's pocket. Upon interviewing Cody Abney[,] Deputy Reed learned that there was a significant amount of marijuana stored at the above described residence.

. . . .

The affiant conducted an interview with Cody Abney. Based on the interview the affiant learned that Cody Abney lived at the above described residence with his father, Dallis Abney. Cody Abney indicated that Dallis Abney keeps approximately 10 to 20 pounds of marijuana in the safe at the home along with proceeds from the sale of marijuana. He indicates Dallis Abney sells the marijuana out of the house and that he keeps the marijuana in a safe that is weighed out on scales as he sells it.

The district court issued a search warrant that same day and Brewer executed it in the morning.

During the search, a large quantity of marijuana was discovered at Abney's residence along with prescription pills. Abney was indicted on the following charges: trafficking in marijuana, greater than five pounds; trafficking in a controlled substance, second-degree, first offense; possession of a controlled substance, first-degree, first offense; possession of drug paraphernalia; prescription controlled substance not in proper container, first offense; and two counts of possession of a controlled substance, third-degree.

Abney filed a motion to suppress arguing the search warrant was invalid because the supporting affidavit was insufficient: (1) it did not disclose when Cody observed the marijuana at his father's house; (2) it did not provide any evidence regarding the credibility or reliability of Cody and the police did nothing

to corroborate Cody's statements; and (3) it contained material falsehoods. The circuit court held an evidentiary hearing and Brewer, Abney, Cody, private investigator James Stark and Reed testified.

Brewer testified when he spoke with Cody on the phone, Cody gave his personal information and address, which was the same address as on the search warrant; stated there were probably fifteen pounds of marijuana in his house and garage; and that his father hides marijuana all over the house.

Abney testified that at the traffic stop, Reed stated he could smell marijuana. He agreed to a search of his vehicle and Reed did not find anything. When he produced his license from his pocket, the license had money wrapped around it, secured with a rubber band. He had sawdust in his pocket because he had been helping another individual build a porch but Reed believed the substance was marijuana and arrested him despite his explanation. Abney believed the trafficking charge from the traffic stop was dismissed because his pants were never sent to the lab for testing.

Private investigator Starks testified he was hired by Abney to take possession of Abney's money and pants from the Powell County Sheriff's Office. He testified he examined the pants for marijuana and found no indication of the substance or that the pants had been sent to the lab for analysis.

Cody testified and denied there was any odor of marijuana in the vehicle or any marijuana in the vehicle. He testified sawdust fell out of his father's

pocket when Abney produced his license and Reed stated the substance was marijuana.

Cody testified he was questioned at the police station for about three and a half hours before he told Reed he had seen marijuana at Abney's house, but he did not give the date or time of his observation. Cody denied saying Abney sells marijuana out of his house or weighs anything he sells on scales. He admitted telling the officers that Abney keeps ten to twenty pounds of marijuana at his residence but did not tell them he had seen marijuana there recently.

Cody testified he had lived at his father's house in the past but, at the time he was questioned, resided primarily with his brother at another location. He admitted he told the officers he lived at his father's address.

Reed testified that during the traffic stop, Abney produced approximately \$6,000 in cash and some cards in his pocket that smelled of marijuana and several crushed-up, small green leaves were in Abney's pocket that he believed were marijuana. He testified he collected the green leaves but did not send them to the lab for analysis.

Reed previously received two reports of drug trafficking at Abney's residence and, therefore, asked Cody if there was any drug trafficking or other illegal activity at the residence. Reed testified Cody detailed seeing Abney weighing marijuana on scales on his bed and seeing money and marijuana in a safe. Cody told him how to find approximately twenty pounds of marijuana in

Abney's garage. Reed relayed this information to Brewer. Reed arranged a call between Brewer and Cody so that Brewer could talk to Cody himself.

The circuit court denied the motion to suppress, determining under the totality of the circumstances the affidavit provided probable cause for the issuance of the search warrant. The circuit court found Cody to be a reliable informant based on his being Abney's son and living with Abney. It found Reed's belief that there was a marijuana odor in the car and the leaves in Abney's pocket were marijuana to be genuine, whether or not his belief was correct.

The circuit court determined Abney failed in his burden to show the affidavit contained false and misleading statements because the facts were contested as to whether there was an odor of marijuana in the car and as to what Cody actually said to Reed and Brewer. The circuit court made a credibility determination against Cody's testimony and chose to believe Cody made the statements Brewer and Reed attributed to him. Therefore, based upon the totality of circumstances presented within the affidavit, the circuit court determined there was sufficient cause to issue the search warrant based on statements from Cody.

Abney entered conditional pleas of guilty to trafficking in marijuana greater than five pounds; possession of a controlled substance, second-degree; and possession of a controlled substance, first-degree. The remaining counts were dismissed. Abney received concurrent sentences totaling five years in prison and was ordered to pay a \$1,000 fine.

Abney appeals from the final judgment based on the denial of his motion to suppress, arguing the underlying affidavit was insufficient to establish probable cause to support the issuance of the search warrant. When reviewing a court's order denying a motion to suppress, we consider its factual findings conclusive if supported by substantial evidence in accordance with Kentucky Rules of Criminal Procedure 9.78. If these findings are supported, we conduct a *de novo* review of the trial court's application of the law to those facts in order to determine whether its decision was correct as a matter of law. *Buster v. Commonwealth*, 406 S.W.3d 437, 439 (Ky. 2013).

Abney argues Cody's statement was legally insufficient to establish probable cause because he did not state when he observed the marijuana at his father's residence. In the early 1960s, *Henson v. Commonwealth*, 347 S.W.2d 546, 548 (Ky. 1961), established that an affidavit based on the affiant's personal observation was defective unless it disclosed when the observation was made. Therefore, an affidavit stating that contraband is presently at the location to be searched, whether made based on the affiant's personal observation or based on information or belief, required a positive statement as to when the contraband was observed. *Williams v. Commonwealth*, 355 S.W.2d 302, 302-303 (Ky. 1962).

In *Gossett v. Commonwealth*, 426 S.W.2d 485, 486 (Ky. 1968), the Kentucky Supreme Court indicated a shift away from strict requirements given in *Henson* for determining the sufficiency of affidavits in accordance with the

guidelines given in *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13

L.Ed.2d 684 (1965):

[A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. . . .

. . . .

[W]here [underlying] circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

Id. at 108-109, 85 S.Ct. at 746. This shift can be seen in the cases following *Gossett*.

In *Beemer v. Commonwealth*, 665 S.W.2d 912, 915 (Ky. 1984), Kentucky adopted the “totality of the circumstances” test in accordance with *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). *Gates* also reinforces that a probable cause determination should not be hypertechnical but instead be judged by the circumstances as a whole:

the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a substantial basis for

concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. We think reaffirmation of this standard better serves the purpose of encouraging recourse to the warrant procedure and is more consistent with our traditional deference to the probable cause determinations of magistrates[.]

. . . .

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing

court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

Id. at 236-239, 103 S.Ct. at 2331-2332.

In reviewing Brewer’s affidavit under this standard, Cody’s statements to Reed and Brewer established his personal observation and detailed knowledge of an ongoing criminal enterprise at his own residence. Accordingly, they were sufficient to establish “a fair probability that contraband . . . will be found in a particular place.” *Id.* at 238, 103 S.Ct. at 2332.

Abney argues the affidavit was also insufficient to support a finding of probable cause because Brewer had no information as to Cody’s reliability. An affidavit that contains detailed information provided by a named informant does not require any allegations regarding the credibility or reliability of the informant. *Embry v. Commonwealth*, 492 S.W.2d 929, 931-932 (Ky. 1973); *Commonwealth*

v. Hubble, 730 S.W.2d 532, 534 (Ky.App. 1987). Cody's status as a named informant and son of Abney currently living at his residence, along with his detailed personal observations, established his veracity and base of knowledge; therefore, his credibility was not in doubt.

Abney finally challenges the facts given in the affidavit as being false and, thus, improperly relied upon in the issuance of the search warrant. To challenge an affidavit supporting a search warrant, the defendant must establish by a preponderance of the evidence that the affidavit contains a statement that is a deliberate falsehood or submitted with a reckless disregard for the truth. *Blane v. Commonwealth*, 364 S.W.3d 140, 146 (Ky. 2012). If a deliberate falsehood is established, the court must examine whether the affidavit's remaining content is sufficient to establish probable cause; if it is not, the search warrant must be voided and the fruits of the search suppressed. *Id.*

The circuit court properly made credibility findings in favor of Reed and Brewer in determining there were no material falsehoods included in Brewer's affidavit. The circuit court was entitled to believe its version of Cody's statements over the version Cody gave during the suppression hearing. Whether or not there was marijuana in Abney's pocket, Reed's reasonable belief could properly form the basis of his statement to that effect, even if his belief was subsequently found to be faulty. Abney has failed to establish any material falsehoods in Brewer's affidavit and, consequently, the affidavit properly supported the district court's finding of probable cause to issue a search warrant.

Accordingly, we affirm the final judgment of the Estill Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Russell J. Baldani
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky