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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002250-MR

ANTHONY RUSTIN — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 07-CR-00019

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,[1] SENIOR JUDGE.

COMBS, JUDGE: Anthony Rustin appeals from an order of the Caldwell Circuit Court denying his motion to suppress evidence seized during a search conducted pursuant to a warrant. After our review of the record and the pertinent law, we vacate the order and remand.

On the afternoon of September 29, 2006, Trooper William Braden of the Kentucky State Police (KSP) received a telephone call from an anonymous tipster.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to section 110(5)(b) of the Kentucky Constitution and KRS 21.580

The caller told Braden that he had observed Rustin unloading a substantial amount of marijuana from an all-terrain vehicle (ATV) and placing it into a barn on Rustin's property. Trooper Braden was not acquainted with the tipster; nor was he aware of any past interaction or experience with the informant by any other law enforcement officer.

Upon receiving the tip, Trooper Braden and another KSP officer drove to the address provided by the caller. They observed that the barn's location in relation to the house was accurately described. They also ran a check on the license plate of a pickup truck that was in the driveway of the residence. It was registered to Rustin.

Trooper Braden testified that although he did not knock on the door of the residence, he assumed that no one was at home because the house was dark. He and the other detective then prepared an affidavit which they presented to the local district judge. The affidavit did not identify the informant. The judge found probable cause and signed a search warrant for Rustin's barn.

In the search that followed, KSP officers found nearly eight pounds of marijuana in a horse trailer inside the barn and a small amount in Rustin's residence.[2] Rustin and the ATV were found at his family's hunting lodge two miles away from his home.

In February 2007, Rustin was indicted for one count of trafficking in marijuana over five pounds, first offense; and one count of possession of drug

[2] Rustin's wife had consented to the search of the residence following their search of the barn.

paraphernalia, first offense.[3] On January 3, 2008, the trial court held a hearing concerning Rustin's motion to suppress evidence seized as a result of the search warrant; it denied the motion. On December 2, 2009, Rustin entered a conditional plea of guilty to one count of trafficking in marijuana more than eight ounces, less than five pounds. He received a sentence of five-years' incarceration. This appeal follows.

Rustin argues that the trial court erred in denying his motion to suppress because the search warrant was not supported by probable cause. He contends that KSP's reliance on the word of an anonymous tipster alone failed to provide the requisite probable cause to justify issuance of a search warrant.

The Fourth Amendment of the U.S. Constitution mandates that "no Warrants shall issue, but upon probable cause[.]" Kentucky's parallel provision is Section 10 of our Constitution, which provides that "no warrant shall issue to search any place . . . without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

In *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the Supreme Court of the United States established the guidelines for determining whether sufficient probable cause for a warrant existed as a result of an anonymous tip. The Court held as follows:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair

[3] Rustin, a Vietnam veteran, has no criminal history.

> 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 238-239. (citations omitted). The Supreme Court of Kentucky adopted this totality-of-the-circumstances test in *Beemer v. Commonwealth*, 665 S.W.2d 912 (Ky. 1984).

Inherent in the totality-of-the-circumstances test is that there must be "a balancing of the relative indicia of reliability accompanying an informant's tip." *Johnson v. Commonwealth*, 180 S.W.3d 494, 499 (Ky.App. 2005)(*citing Gates, supra*, at 234). Our review must focus upon the four corners of the affidavit without recourse to or consideration of extrinsic evidence. *Commonwealth v. Pride*, 302 S.W.3d 43, 49 (Ky. 2010).

In examining the element of probable cause, our courts have repeatedly and consistently emphasized the importance of an informant's reliability and the existence of a credible basis for believing in the reliability of an informant. *See Hampton v. Commonwealth, supra; Johnson v. Commonwealth, supra; U.S. v. May*, 399 F.3d 817 (6th Cir. 2005). Very recently, our Supreme Court stated that a police investigation began "after determining that the confidential informant was reliable, a fact *critical* to the determination of probable cause[.]" *Commonwealth v. Pride*, 302 S.W.3d at 50. (Emphasis added). In *U.S. v. Allen*, 211 F.3d 970 (6th Cir. 2000) (*en banc*), an informant had worked extensively with law enforcement in the past. The Sixth Circuit held that the reliability of the informant was so well

established that his tip alone provided sufficient probable cause for a warrant to be issued – while simultaneously warning by a clear *caveat* that such acceptance should not automatically apply and that the totality of the circumstances must be utilized.

A tipster who identifies himself by name is given more credibility than one who is wholly anonymous. *Commonwealth v. Kelly*, 180 S.W.3d 474, 477 (Ky. 2005). However, those tips are not always sufficient without other indicia of reliability. *Hampton v. Commonwealth*, 231 S.W.3d 740, 746 (Ky. 2007).

At the threshold of our inquiry is an examination of the affidavit upon which a search warrant is based. It is the affidavit which succeeds or fails in convincing a court that probable cause indeed is present. We have researched case law to determine what criteria are employed by our courts in scrutinizing an affidavit for sufficiency.

The Commonwealth has cited *Lovett v. Commonwealth*, 103 S.W.3d 72, 78 (Ky. 2003), for the proposition that an affidavit need not contain a detailed recitation concerning an informant's reliability. Our Supreme Court refused to adopt a strict rubric requiring such adherence to a formula or list of factors:

> Thus, the mere fact that DeFew's affidavit did not contain recitations as to the informant's veracity, reliability, and basis of knowledge is not conclusive that the warrant was issued without probable cause.

Id. at 78. The *Lovett* Court carefully analyzed other criteria touching upon the informant's reliability. Most convincing to the court was the fact that the informant implicated and indeed incriminated himself in the alleged crime. The

Court held that such an admission against his own penal interest clothed the informant with sufficient reliability to render the affidavit adequate.

> While the confidential informant in the present case did not specifically admit to criminal activity, he made such statements detrimental to his penal interest as that he was a regular visitor to Appellant's methamphetamine laboratory and that he had been in possession of a duffel bag containing items used in the manufacture of methamphetamine. Therefore, these facts provide another "indicium of reliability" to the information provided by the confidential informant.

Id. at 79.

In *Hampton, supra*, our Supreme Court held that a tip from an informant (even though it came from an informant who was familiar to police officers) was too vague to provide probable cause. However, it upheld the finding of probable cause based on corroborating circumstances recited in the affidavit. Courts have found that probable cause existed in several cases where the affidavits related to past experiences with informants. *Johnson, supra*; *May, supra*; *U.S. v. Taylor*, 301 Fed. Appx. 508 (6th Cir. 2008); *Pride, supra; Allen, supra*.

U.S. v. Miller, 314 F.3d 265 (6th Cir. 2002), involved an informant who did not have past experience with police. However, the fact that he was willing to continue working with them and to be named in the affidavit was held to have provided probable cause. The Court also found the informant's depth and precision of detail to be persuasive. Thus, the courts consistently analyze the totality of the circumstances on a case-by-case basis without announcing a rigid or certain listing of factors as determinative.

In the case before us, we are urged to accept the tip alone as being sufficient to constitute probable cause for the district judge to have issued a search warrant. However, the underlying affidavit did not supply **any** facts indicating the reliability, experience, or past history of dealing with the informant. It merely referred to an anonymous telephone call from a "confidential informant" who had observed certain alleged activity. The affidavit did not indicate whether the informant had been involved with Rustin (at the risk of his own penal interest as in *Lovett, supra*) or whether he had seen Rustin from a distance. It did not indicate whether the police knew anything about the informant or why he wished to remain unnamed in the affidavit. Later, at the suppression hearing, Trooper Braden testified that he was unfamiliar with the informant and did not believe that other law enforcement officers had past experiences that would reflect on the informant's reliability.

Courts have found that although affidavits lacked probable cause based on informants' tips, nonetheless probable cause might result from police investigations corroborating the reliability of the tips. *See Gates, supra*; *U.S. v. Smith*, 783 F.2d 648 (6th Cir. 1986). The corroboration here consisted of merely verifying the informant's description of the residence and its spatial relation to the barn on the property. A vehicle on the premises was registered to Rustin. The Sixth Circuit addressed a highly similar situation in *U.S. v. Hammond*, 351 F.3d 765 (6th Cir. 2003), and declined to find probable cause – in spite of the fact that the affiant named one informant and had received additional anonymous tips:

> Neither the anonymous phone calls nor [the detective's] drive by Hammond's residence can be considered substantial enough to corroborate Holt's tip for purposes of probable cause. First, Holt was not established as a reliable informant in any respects. Second, the information provided by Holt and the anonymous callers was lacking in detail[.] . . . Third, [the detective], when driving by the property, noticed nothing out of the ordinary at the Hammond residence. [The detective] only served to corroborate the fact that a Hammond lived in Rockcastle County on KY 1955 and that there was a gate across his property. Such information would not be difficult for anyone to obtain and does not suggest criminal activity.

Id. at 773. Such information is precisely what supported the affidavit in the case before us.

In *U.S. v. Leake*, 998 F.2d 1359 (1993), probable cause was not found after police conducted surveillance on a home for two nights without observing any suspicious activity. In *Leake*, the Sixth Circuit observed as follows, "this case demonstrates the importance of taking sufficient time to verify an anonymous tip before a warrant is requested. . . . More police work was needed." *Id*. at 1365.

The analogy to both *Leake* and *Hammond* is compelling in our review of the case before us. The informant provided some detail and first-hand observation, but the affidavit did not provide information as to if or why the informant wished to remain anonymous; it did not state whether the informant's information resulted from involvement in Rustin's alleged activity; and the corroborating details were information that could easily be obtained by any member of the public – the very kind of information deemed to be insufficient corroboration by *Leake* and *Hammond*. The police officers could have spent more time obtaining information

rather than seeking a search warrant on the day that they received the tip. Case law dictates that indeed they should have: "More police work was needed." *Leake, supra*.

The Commonwealth argues that if we determine that there was no probable cause for a search warrant, we should still uphold it as valid under a good-faith exception. We disagree.

The Supreme Court of the United States established the good-faith exception to the exclusionary rule in *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), holding that evidence obtained by a defective warrant will not be excluded if law enforcement officers had acted in good faith when they carried out the warrant. However, the *Leon* court provided exceptions to its own rule. *Leon* recited circumstances in which the officer's reliance would **not** be reasonable: (1) if the affidavit contains false or misleading information; (2) in cases of abandonment by the judge of a detached and neutral role; (3) in cases where the officer's belief in the existence of probable cause is entirely unreasonable; and (4) where the warrant is facially deficient by failing to describe the place to be searched or the thing to be seized. *Crayton v. Commonwealth*, 846 S.W.3d 684, 687-88 (Ky. 1992)(Citing *Leon*, 468 U.S. at 922-24, 104 S.Ct. at 3420-21).

The third *Leon* exception governs in this case. The officer's belief in the existence of probable cause was unreasonable under the criteria set forth in case law. We have examined the four corners of the affidavit, and we can discover no

indicia of reliability. The independent police corroboration was cursory and inadequate to provide a showing of probable cause.

Accordingly, we vacate the order of the Caldwell Circuit Court denying Rustin's motion to suppress and remand for further proceedings.

ALL CONCUR.

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