

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 17, 2005 Session

STATE OF TENNESSEE v. JOE L. DAVIS, JR.

**Appeal from the Criminal Court for Hamblen County
No. 04CR128 James E. Beckner, Judge**

No. E2004-02024-CCA-R3-CD - Filed August 17, 2005

The Appellant, Joe L. Davis, Jr., presents for review a certified question of law following his guilty pleas to two counts of Class B felony possession of cocaine and one count of felony possession of marijuana. *See* Tenn. R. Crim. P. 37(b)(2)(i). Davis was subsequently sentenced to an effective eight-year sentence in the Department of Correction. As a condition of his guilty plea, Davis explicitly reserved a certified question of law challenging the denial of his motion to suppress evidence found upon the execution of a search warrant at his residence. Davis argues that the affidavit given in support of the warrant is insufficient to establish probable cause. After review of the record, we agree. Accordingly, we reverse the judgment of the trial court and dismiss the Appellant's judgments of conviction.

Tenn. R. App. P. 3; Judgment of the Criminal Court Reversed and Dismissed

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Jack T. Marecic, Rogersville, Tennessee, for the Appellant, Joe L. Davis, Jr.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; C. Berkeley Bell, District Attorney General; and Paige Collins, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Procedural History

On September 10, 2003, officers with the Hamblen-Morristown Multiple Crimes Unit executed a search warrant of the Appellant's residence at 2825 Jefferson Diamond Rd., Apt B in Morristown. According to the "prosecution report," the search yielded 3.6 grams of crack cocaine, 25.6 grams of cocaine, 118.8 grams of marijuana, 18 Valium pills, a loaded 9 mm Beretta handgun, and \$992. On June 14, 2004, a Hamblen County grand jury returned a four-

count indictment against the Appellant, charging him with: (1) possession of a Schedule II controlled substance, cocaine, with the intent to sell, over .5 grams; (2) possession of a Schedule II controlled substance, cocaine base, with the intent to sell, over .5 grams; (3) possession of a Schedule IV controlled substance, diazepam, with the intent to sell; and (4) possession of a Schedule VI controlled substance, 106.4 grams of marijuana, with the intent to sell.

On July 7, 2004, the Appellant filed a motion to suppress the evidence found during the search. In support of the motion, the Appellant alleged that the affidavit given in support of the warrant was insufficient to establish probable cause, that officers failed to comply with knock and announce requirements before entering the residence, and that officers used excessive force in the execution of the warrant. After a suppression hearing, the trial court found the affidavit contained sufficient probable cause to support issuance of the warrant and that the knock and announce rule, if not complied with, was excused based upon exigent circumstances. On July 23, 2004, the Appellant pled guilty to two counts of possession of over .5 grams of cocaine with the intent to sell and one count of possession of marijuana with the intent to sell. The remaining charge was dismissed. As part of the plea agreement, the Appellant received eight-year sentences for each cocaine conviction and a one-year sentence for the marijuana conviction, with all sentences running concurrently. Moreover, as part of the agreement, the Appellant explicitly reserved a certified question of law, which is now before this court on appeal.

Analysis

In this appeal, the Appellant seeks review of the following certified question of law:

Whether the search warrant affidavit in this case contains sufficient information for the issuing magistrate to find probable cause for the issuance of a search warrant to search 2825 Apartment B, Jefferson Diamond Road, Morristown, Tennessee?

I. Certified Question of Law

Rule 37(b)(2)(i), Tennessee Rules of Criminal Procedure, allows an appeal from a guilty plea in certain cases under very narrow circumstances. An appeal lies from a guilty plea, pursuant to Rule 37(b)(2)(i), if the final order of judgment contains a statement of the dispositive certified question of law reserved by the Appellant, wherein the question is so clearly stated as to identify the scope and the limit of the legal issues reserved. *State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988). The order must also state that the certified question was expressly reserved as part of the plea agreement, that the State and the trial judge consented to the reservation, and that the State and the trial judge are of the opinion that the question is dispositive of the case. *Id.* An issue is dispositive when this court must either affirm the judgment or reverse and dismiss. *State v. Wilkes*, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984). If these circumstances are not met, this court is without jurisdiction to hear the appeal. *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996). The burden is on the Appellant to see that these prerequisites are in the final order and that the record brought to the appellate court contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified. *Id.*

The record before us evidences that the requirements of Rule 37 have been met. Accordingly, we proceed to address the merits of the Appellant's argument with regard to his motion to suppress.

II. Motion to Suppress

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." *Id.* Nevertheless, review of the trial court's application of the law to the facts is purely *de novo*. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. *Odom*, 928 S.W.2d at 23.

Our supreme court has explained that the Fourth Amendment to the United States Constitution requires that search warrants issue only "upon probable cause, supported by Oath or affirmation." Article I, Section 7 of the Tennessee Constitution precludes the issuance of warrants except upon "evidence of the fact committed." Therefore, under both the federal and state constitutions, no warrant is to be issued except upon probable cause. Probable cause has been defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act. *State v. Henning*, 975 S.W.2d 290, 294 (Tenn. 1998) (citations omitted). In this state, "a finding of probable cause supporting issuance of a search warrant must be based upon evidence included in a written and sworn affidavit." *Id.* Specifically, in "order to establish probable cause, an affidavit must set forth facts from which a reasonable conclusion may be drawn that the contraband will be found in the place to be searched pursuant to the warrant." *State v. Norris*, 47 S.W.3d 457, 470 (Tenn. Crim. App. 2000). The affidavit must contain more than conclusory allegations. We note that "affidavits must be looked at and read in a commonsense and practical manner, and that the finding of probable cause by the issuing magistrate is entitled to great deference." *State v. Bryan*, 769 S.W.2d 208, 211 (Tenn. 1989) (citations omitted).

In *State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn. 1989), our supreme court adopted the two-pronged *Aguilar-Spinelli* test "as the standard by which probable cause will be measured to see if the issuance of a search warrant is proper under Article I, Section 7 of the Tennessee Constitution." See *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. (1964). Specifically, "hearsay information supplied by a confidential informant can not support a finding of probable cause unless it also contains factual information concerning the informant's basis of knowledge and credibility." *Henning*, 975 S.W.2d at 294-95 (citing *Jacumin*, 778 S.W.2d at 432, 436). However, independent police corroboration of the information provided by the informant may make up deficiencies in either prong. *State v. Powell*, 53 S.W.3d 258, 263 (Tenn. Crim. App. 2000).

This court has explained that “under the . . . ‘basis of knowledge’ prong, facts must be revealed which permit the magistrate to determine whether the informant had a basis for his information or claim regarding criminal conduct.” *State v. Lowe*, 949 S.W.2d 300, 304 (Tenn. Crim. App. 1996); *see also State v. Moon*, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992). The informant must describe the manner in which he gathered the information, or the informant must describe the criminal activity with great particularity. *State v. Steven Woodward*, No. 01C01-9503-CR-00066 (Tenn. Crim. App. at Nashville, Feb. 23, 1996).

The second prong of the *Aguilar-Spinelli* test, sometimes referred to as the reliability, veracity, or credibility prong, deals with the truthfulness of the informant. Under this prong, “facts must be revealed which permit the magistrate to determine either the inherent credibility of the informant or the reliability of his information on the particular occasion.” *Moon*, 841 S.W.2d at 338.

The relevant portions of the affidavit given in support of the search warrant by the affiant, Sergeant Steve McBride with the Hamblen County Sheriff’s Department, provide as follows:

2. During the past days the Hamblen-Morristown Multiple Crimes Unit has received numerous complaints related to drug trafficking at a duplex at 2825 Apt B Jefferson Diamond Rd. Morristown Hamblen Co. TN. These complaints have been from sources that wish to remain anonymous. Numerous vehicles were reported coming and going, particularly during the evening hours. The persons visiting the area were reportedly staying for only brief periods of time. Crack Cocaine was the drugs suspected by at least one caller, being sold at the duplex. . . . Agents with the Hamblen-Morristown Multiple Crimes Unit has conducted surveillance on the duplex . . . during the past days, and Agents has observed numerous vehicles at the duplex. . . .
3. An undercover informant working with the Hamblen-Morristown Multiple Crimes Unit has, within the past 7 days purchased Crack Cocaine from a black male A Joe L Davis Jr. A.K.A. Little Joe at the duplex. . . .

In concluding that the affidavit was supported by probable cause, the trial court found:

In this case, you have a double layer of informants. You have a first layer of informants of the anonymous calls that come in; and the question is, is that information reliable. Well, without testing it, that information can’t be deemed reliable, but what these officers did . . . in their quest for a search warrant was to see if they could corroborate the information received by the anonymous informants was that suspected drug dealing at this place because, unusually, there were a whole lot of people coming there and staying for a short period of time and leaving. And that’s one of the reasonable things that we give suspicion, not probable cause, but suspicion to illegal drug activity.

And then they followed it up by doing two things. One, they set up surveillance, . . . and this is all set out in the affidavit of the search warrant. The

surveillance showed that exactly what was happening that the anonymous calls said were happening. The officers stayed there for a couple of days, and they saw that there were a lot of cars coming and going, staying for search periods of time. And based upon that, the officers sent their own, . . . multiple crimes unit sent in their own informant. And it is a different kind of informant, but it's a person employed by the multiple crimes unit to go in specifically for the purpose of making a buy. This person, they say in their affidavit, did go in and bought cocaine within the last seven days. So these circumstances certainly show the reliability of the information received by the anonymous informant, and also show the reliability of the informants themselves.

And then you have to come to the next level, the informant sent in by the drug crime unit for the purpose of making that purchase. The affidavit says that they were sent in by the multiple crime unit and that a purchase was made of cocaine Given the circumstances and information up to that time, the fact that this informant was an agent of the - - sent in there for the specific purpose by the crimes unit and not just some informant that came to them and said that they had been in there within the last seven days and purchased drugs, gives credibility and reliability to that informant and so - - and the information received from that. So the information and the informants under the Aguilar-Spinelli test, applying Jacumin and not in a hyper-technical sense but a reasonable sense, makes the search warrant good

As observed by the trial court, the affidavit contained three bases in support of probable cause: (1) anonymous citizen tips called in to an "answering machine"; (2) police surveillance; and (3) a confidential informant's purchase of drugs from the Appellant. The Appellant asserts that the three separate sources taken as a whole are insufficient to establish probable cause. First, he argues that the anonymous tips were insufficient because the only objective information provided by the unnamed callers was essentially that numerous vehicles were seen coming and going from the Appellant's residence. With regard to the police surveillance, the Appellant concedes that the affidavit contained information that numerous vehicles were observed at the duplex, thus corroborating the anonymous callers information. However, he contends that the affidavit is completely lacking in information which would support a conclusion that illegal drugs were located at the residence, such as observing drugs, drug deals, known drug dealers at the scene, or defined suspicious activities. Finally, he asserts that the statements in the affidavit regarding the confidential informant's purchase of drugs are conclusory and fail to establish the informant's basis of knowledge or veracity as required by *Jacumin*.

We agree that the police surveillance tends to corroborate the statements made by the anonymous callers. The surveillance revealed multiple cars arriving at the Appellant's home late in the evening, staying for brief periods. However, suspicious activity standing alone is insufficient to support a finding of probable cause. Thus, the question of whether the affidavit supports a finding of probable cause turns on whether the information received from the confidential informant, who purchased illicit drugs from the Appellant, satisfies the two-pronged test of *Aguilar-Spinelli*. Moreover, we agree with the trial court's findings that the informant's basis of knowledge was sufficiently established by the fact that the affidavit states that the

informant entered the residence within the last seven days and purchased cocaine. However, the affidavit is void of any proof regarding the informant's veracity.

The trial court, in finding sufficient proof of the informant's veracity, concluded that:

“multiple crimes unit sent in their own informant. And it is a different kind of informant, but it's a person employed by the multiple crimes unit to go in specifically for the purpose of making a buy. . . . [T]his informant was an agent . . . sent in there for the specific purpose by the crimes unit and not just some informant that came to them and said that they had been in there within the last seven days and purchased drugs.”

We find nothing in the affidavit to support the trial court's characterization of the informant as an “agent,” “different kind of informant,” “not just some informant that came to them,” or as a specially trained informant. The affidavit states only that “[a]n undercover informant working with the Hamblen-Morristown Multiple Crimes Unit . . . purchased Crack Cocaine.” In determining if probable cause exists, the issuing magistrate is bound by the four corners of the affidavit. *State v. Keith*, 978 S.W.2d 861, 870 (Tenn. 1998) (citing *Jacumin*, 778 S.W.2d at 432). The affidavit presented here was devoid of any information which established the informant's veracity, such as participation in previous drug purchases for law enforcement or that the informant had previously provided correct and accurate information to law enforcement. Moreover, no independent police corroboration is presented to bolster the deficiency of the credibility prong. Accordingly, we conclude that the evidence preponderates against the trial court's findings, and we further conclude that the information contained in the affidavit is insufficient to support a finding of probable cause. Accordingly, the trial court's denial of the Appellant's motion to suppress is reversed.

CONCLUSION

Based upon our conclusion that the affidavit is insufficient to support a finding of probable cause, the ruling of the trial court denying the Appellant's motion to suppress is reversed, and the judgments of conviction are vacated and dismissed.

DAVID G. HAYES, JUDGE