IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
APRIL SESSION, 1995

FILED

October 13, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9409-CR-00315
Appellee	)	
	)	HAMBLEN COUNTY
vs.	)	
	)	Hon. **JAMES E. BECKNER**, Judge
JOHNNY SCARLETT and)		
TODD LOGAN,	)	(Simple possession of a controlled
	)	substance, marijuana; Possession of
Appellants	)	drug paraphernalia)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellants, Johnny Scarlett and Todd Logan, pled guilty to one count of possession of less than one-half ounce of marijuana, a class A misdemeanor, in the Criminal Court of Hamblen County. Scarlett also pled guilty to one count of possession of drug paraphernalia, also a class A misdemeanor. Pursuant to T.R.A.P. 3(b) and Tennessee Rule of Criminal Procedure 37(b)(2)(i), the appellants explicitly reserved the right to challenge the admissibility of evidence allegedly seized in violation of the Fourth Amendment of the United States Constitution and Article I, § 7 of the Tennessee Constitution.

After reviewing the record, we affirm the appellants' convictions.

I. Factual Background

On October 19, 1993, Agents Jeff Seals, Wayne Livesay, and Mike Long, assigned to the Third Judicial District Drug Task Force, and Officer Mike Hooper, from the Hamblen County Sheriff's Department, executed a search warrant at a home owned by the appellant, Johnny Scarlett. Both Scarlett and appellant Todd Logan lived in the home, on separate floors. Both appellants were at home at the time of the search.

A Hamblen County General Sessions judge issued the search warrant on the basis of information contained in an affidavit signed and submitted by Agent Seals. The affidavit reads in relevant part:

> On 10-18-93 affiant received information from a confidential reliable informant stating within the last seven days of 10-18-93 confidential reliable informant observed marijuana both upstairs and downstairs of the above decribed [sic] residence. Said confidential reliable informant is familiar with and can identify marijuana. Said confidential reliable informant has given reliable information in the past which has resulted in at least one arrest and conviction. Confidential reliable informant has given names of other individuals involved in illegal drug activity in the Third Judicial District. This information was investigation [sic] by myself along

with other agents of the Drug Task Force and was proven to be true and accurate in all aspects [sic].

The search uncovered a quantity of marijuana on both floors and drug paraphernalia in Scarlett's portion of the house. Both appellants were issued citations to appear in court. They were later arrested pursuant to warrants. A preliminary hearing was held on November 18, 1993. On February 14, 1994, both appellants were indicted for possession of less than one-half ounce of marijuana. Scarlett was also indicted for possession of drug paraphernalia.

On July 15, 1994, a suppression hearing was held at which the appellants challenged the sufficiency of the search warrant. First, the appellants attacked the past reliability of the confidential informant. In the search warrant, Agent Seals stated that information provided by this informant had resulted in at least one arrest and conviction. However, at the preliminary hearing, Agent Seals and defense counsel participated in the following, somewhat confusing, exchange:

Q. Has this informant ever given you [Agent Seals] any information in the past?
A. Yes sir.
Q. And did that ever result in any arrest or convictions?
A. Arrest and convictions, no sir, not at this point.
Q. I don't think he understood my question. Okay, just strike it. The information that the informant has given you, is that an ongoing investigation?
A. Yes sir.
Q. Okay. So there's not been any arrest made on that --
A. Yes sir.
Q. -- information, am I correct?
A. Yes sir there's been arrest made and conviction.
Q. And a conviction?
A. Yes sir.
Q. I misunderstood you --
A. I may have misunderstood your question.
Q. Okay, you're talking about this case?
A. I can't remember your question you first said.
Q. Let me rephrase my question. This information, and I'm talking about the reliability of this informant goes to that issue, you say ... [t]his informant has given you information in the past?
A. Yes sir.
Q. Okay, has that information proven to be reliable?
A. Yes sir it has.
Q. Has it resulted in any arrest or convictions?
A. I said in the affidavit that this informant has given

information to myself and other members of the drug task force. Not only has she --- has this informant worked for me, the informant has worked for Mike Long and Wayne Livesay, so --
Q. I understand.
A. Over the period of one year, I've found all her --- information to be reliable.
Q. My question was, and I know I'm not doing a good job of asking it. Has this information that the informant has given you in the past, has that resulted in any arrest or convictions as of today?
A. My personal information that she's given me, no sir.
Q. Okay.
A. Two other agents, yes.
Q. But not to you?
A. Not to me, no sir.
Q. Has the information that this informant has given to other law enforcement officers, to your knowledge has that resulted in any arrest or convictions.
A. Not at this point, no.
Q. Still an on going case?
A. Yes sir.

At the suppression hearing, Agent Seals testified that the informant had, in fact, supplied information to Agent Long, resulting in an arrest and conviction. On cross-examination, Seals conceded that, at the preliminary hearing, he "may have got it crossed up or confused the way you [defense counsel] worded" the questions.

The appellants also attacked the reliability of the information provided by the informant in this case and contained in the search warrant at issue. The appellants contended that, contrary to the information in the affidavit, a confidential informant could not have seen the inside of the appellants' residence during the seven days prior to October 18, 1993. Both appellants and members of their families testified in an attempt to prove that no one other than Scarlett's cousin, Donald Hazelwood, visited the appellants' residence during the time in question. Agent Seals testified that Donald Hazelwood is not the anonymous informant.

The trial court denied the appellants' motions to suppress. First, the court found that Agent Seals did not either deliberately or recklessly make a false

statement in the search warrant, whether essential, material, or immaterial to the determination of probable cause. Second, the trial court found that the search warrant sufficiently satisfied the Aguilar-Spinelli test, as set forth in State v. Jacumin, 778 S.W.2d 430, 432, 436 (Tenn. 1989).

II. Analysis

The appellants challenge the constitutionality of the search warrant on two grounds. First, the appellants contend that, under Jacumin, 778 S.W.2d at 432 and 436, the warrant and its accompanying affidavit are insufficient on their face to establish probable cause. Second, the appellants allege that the affidavit contains misstatements sufficient to void the warrant.

In Tennessee, probable cause to issue a search warrant must appear on the face of the affidavit supporting the warrant. State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992). When evaluating the facial validity of a search warrant, a reviewing court must uphold the warrant if the issuing magistrate had a "substantial basis for concluding that a search warrant would uncover evidence of wrongdoing." Jacumin, 778 S.W.2d at 432. Generally, a reviewing court may only consider information brought to the magistrate's attention. Id. See also Moon, 841 S.W.2d at 337-338.

When, as in the present case, information from a confidential police informant serves as the sole basis for probable cause, the affidavit must demonstrate both "(1) the basis for the informant's knowledge, and either (2)(a) a basis for establishing the informant's credibility or (2)(b) a basis establishing that the informant's information is reliable." State v. Ballard, 836 S.W.2d 560, 561 (Tenn. 1991); Jacumin, 778 S.W.2d at 432 and 436. This two-pronged inquiry was first developed in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969), and is commonly

known as the Aguilar-Spinelli test.

In order to satisfy the "basis of knowledge" requirement of the Aguilar-Spinelli test, a warrant relying upon information from a confidential police informant must describe the manner in which the informant acquired the information or must include a detailed description of the criminal activity of the suspects. State v. White, No. 03C01-9408-CR-00277 (Tenn. Crim. App. at Knoxville, June 7, 1995). Clearly, a statement by the informant that she is familiar with and can recognize marijuana and has seen marijuana at the appellants' residence within the last seven days sufficiently describes the basis of the informant's knowledge. Moon, 841 S.W.2d at 339; State v. Ash, 729 S.W.2d 275, 278 (Tenn. Crim. App. 1986).

The appellant contends that testimony at the suppression hearing proved that the confidential informant could not have seen marijuana at the appellants' residence during the seven days prior to the issuance of the warrant. The appellant argues that, therefore, the warrant fails to meet the "basis of knowledge" prong of the Aguilar-Spinelli test. However, this court has previously stated that "even if it [can ultimately be] shown that the informant did not give reliable information [in the instant case], if there is a showing on the face of the affidavit that there was probable cause to issue the search warrant, the magistrate's action is not subject to review." Ash, 729 S.W.2d at 278.

Agent Seals stated in his affidavit that the informant had supplied reliable information to the police in the past, information resulting in at least one arrest and conviction. This statement establishes the second, or "veracity prong" of Aguilar-Spinelli. State v. White, No. 03C01-9408-CR-00277; Moon, 841 S.W.2d at 339. Thus, the face of the affidavit clearly contained sufficient information from which the issuing magistrate could have concluded that probable cause existed.

However, the appellants further contend that Agent Seals falsely stated in his affidavit that information obtained from the informant had resulted in at least one arrest and conviction. There are only two circumstances that authorize the impeachment of an affidavit sufficient on its face: "(1) a false statement made with intent to deceive the Court, whether material or immaterial to the issue of probable cause, and (2) a false statement, essential to the establishment of probable cause, recklessly made." State v. Little, 560 S.W.2d 403, 407 (Tenn. Crim. App. 1978). In either event, a defendant must, as a threshold matter, show that the affidavit contains a false statement. State v. Moon, No. 01C01-9401-CC-00023 (Tenn. Crim. App. at Nashville, September 1, 1994). "Unsupported allegations of misconduct cannot overcome an affidavit sufficient on its face." State v. Thomas, 818 S.W.2d 350, 356 (Tenn. Crim. App. 1991).

The record simply does not support a finding that Agent Seals made a false statement. At the suppression hearing, both Agent Seals and Agent Long testified that, in fact, information from the informant *had* resulted in the prior arrest and conviction of the appellant Todd Logan. Agent Seals and Agent Long both testified that the arrest and conviction occurred before the issuance of the search warrant in the instant case. Finally, Agent Long testified that he had informed Agent Seals of the prior arrest and conviction. An officer may apply for a search warrant on the basis of observations by fellow officers engaged in a common investigation. State v. Brown, 638 S.W.2d 436, 438 (Tenn. Crim. App. 1982)(citing United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 745 (1965)). See also Moon, No. 01C01-9401-CC-00023. Moreover, Agent Long testified that Agent Seals was present at the prior arrest of Todd Logan.

On cross-examination at the suppression hearing, appellants' counsel attempted to impeach Agent Seals with his arguably contradictory prior testimony given at the preliminary hearing. As already mentioned, Agent Seals explained

that he was confused at the earlier hearing by the questions posed by appellants' counsel. Other than Agent Seals' preliminary hearing testimony, appellants' counsel presented no evidence to refute the suppression hearing testimony of Agent Seals and Long that the informant had supplied information resulting in an arrest and conviction.

After hearing evidence on this issue and reading the preliminary hearing transcript "thoroughly," the trial court found that neither circumstance described in Little, 560 S.W.2d at 407, was applicable to this case. The findings of fact and conclusions of law made by a trial judge at the conclusion of a suppression hearing are afforded the weight of a jury verdict. State v. Dick, 872 S.W.2d 938, 943 (Tenn. Crim. App. 1993); State v. Killebrew, 760 S.W.2d 228, 233 (Tenn. Crim. App. 1988). This court will not set aside the judgment of the trial court unless the evidence contained in the record preponderates against its findings. Id. The appellants failed to carry their burden at the suppression hearing.

Accordingly, the judgments of conviction as entered against the respective appellants are affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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DAVID H. WELLES, Judge

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JOHN A. TURNBULL, Special Judge