

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

FILED

January 16, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

*

C.C.A. # 01

CP-9510-CC-00326

APPELLEE,

*

RUTHERFORD COUNTY

VS.

*

JAMES K. CLAYTON, JR., JUDGE

JETT LINDSAY WRIGHT
and
WENDELL WHEELER,

*

(Possession of Marijuana with
Intent to Sell)

*

APPELLANTS.

*

CONSOLIDATED ON APPEAL

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendants, Jett Lindsay Wright and Wendell Wheeler, pled guilty to one count each of possession of over 70 pounds of marijuana for resale. The trial court imposed Range I, eight-year sentences on each of the defendants. All but 180 days was suspended for Wright. All but 365 days was suspended for Wheeler. The defendants reserved the right to appeal as a certified question of law the denial of their motion to suppress the evidence of the 70 pounds of marijuana. See Tenn. R. Crim. P. 11(e) and 37(b)(2). Both Wright and Wheeler present the following issue for review:

(1) whether the affidavit in support of the search warrant was sufficient to establish the confidential informant's veracity.

Wheeler presents the following additional issues for review:

(1) whether the search warrant was invalid because it was anticipatory and failed to meet the requirements for such warrants; and

(2) whether the search conducted exceeded the scope of the warrant.

We affirm the convictions.

On May 28, 1993, a search warrant was issued for the defendant Wright's residence based upon the following affidavit:

[Affiant] does believe that Jett and Jennie Wright [are] now unlawfully keeping a quantity of marijuana for the purpose or with the intention of unlawful possession, sale or transportation thereof, and upon his, her, or their premises, or in his, her or their possession, custody or control upon premises used, occupied, possessed or controlled by him, her or them

Affiant further makes affidavit that on the 27 day of May, 1993, affiant received information from a reputable and reliable person, whose name and identity have been disclosed to the Judge to whom this application is made, that Affiant verily believes, and accordingly represents to the court, that the said informer

is truthful, reliable and credible... because... there has been a previous occasion, or occasions, on which the same informer has given information of violation of law of the state, which information thereafter was found to have been accurate and reliable; [and] ... that within the past 72 hours said informant was in and upon the above described premises and while thereon personally observed (Jett and Jennie Wright) having personal possession and control over a quantity of (marijuana) being held expressly for the purpose of unlawful distribution.

At the suppression hearing, Officer Richard L. Williams testified that he secured the warrant on May 28, 1993, and searched Wright's residence two days later. From the time the warrant was issued until it was executed, police officers had the house under surveillance. On May 30, Officer Williams received information that other officers were following a 1983 Marman tractor trailer which had just entered Rutherford County. Officer Williams waited for the arrival of the vehicle which he believed would be carrying a large portion of marijuana. He and other officers observed the defendant Wheeler drive the tractor trailer truck to the Wright residence and saw him help Wright remove a large box from the truck and place it behind the house. Officer Williams described the box as "closed up." Within five minutes, the officers executed the search warrant.

Officers discovered that the box, which was found in Wright's closed garage, had several packages of marijuana inside. The defendants were in the living room portion of the house; Jennie Wright was not present. Officer Williams acknowledged that the defendant Wright did not sign for the delivery and did not inspect the box for damage; there was no indication that the box had been opened. Officer Williams admitted that he knew the box had not been delivered to the Wright residence at the time he sought the search warrant two days earlier and, in response to questioning, conceded that it "was not a part of the ... warrant." He

testified that the continuing surveillance over the weekend was due to subsequent information supplied by the same informant that "a large quantity of marijuana" would be delivered to the residence. Officer Williams acknowledged that he could have sought a search warrant for the box had there been "some logical reason" to do so. Officer Williams admitted that he had no intention to execute the warrant until the truck and the box arrived at the Wright residence.

Officers seized smaller portions of marijuana in a bathroom closet and in a kitchen cabinet which weighed a total of 29.1 grams. Drug paraphernalia, including electronic scales and rolling paper, was also found. Both Wright and Wheeler were placed under arrest. Wright gave as his address the residence that had been searched. Wheeler provided an out-of-state address.

The trial court denied the motion to suppress. It specifically ruled that the defendant Wheeler lacked standing because he had "no expectation of privacy on the premises of another."

We first address whether either defendant had standing to challenge the search. One who challenges the reasonableness of a search or seizure has the initial burden of establishing a legitimate expectation of privacy in the place or property searched. Rawlings v. Kentucky 448 U.S. 98 (1980); see also State v. Roberge, 642 S.W.2d 716 (Tenn. 1982). A failure on the part of the state to raise the issue of standing at trial serves as a waiver of the issue on appeal. State v. White, 635 S.W.2d 396 (Tenn. Crim. App. 1982); State v. Layne, 623 S.W.2d 629 (Tenn. Crim. App. 1981). In White, our court held as follows:

[T]he State has a duty to notify the defendant that it opposes his motion on standing grounds, a result which reflects the traditional policies of notice and fair play. If the State fails to raise the standing issue, but instead

opposes the motion on the merits, the defendant is entitled to infer that the State concedes his standing and need not offer any evidence relevant to his expectation of privacy.

State v. White, 635 S.W.2d at 399-400.

At the suppression hearing, the state did object to the defendant Wheeler's standing to challenge the warrant. After first observing that "he's got no standing to complain about the search of the house [but] he might have standing to complain about the box," the trial court sustained the state's position. That finding is conclusive on appeal unless the evidence preponderates otherwise. State v. Tate, 615 S.W.2d 161, 162 (Tenn. Crim. App. 1981); Graves v. State, 512 S.W.2d 603 (Tenn. Crim. App. 1973); see Tenn. R. Crim. P. 12(e).

In United States v. Haydel, 649 F.2d 1152, 1154-55 (5th Cir. 1981), the United States Court of Appeals listed seven factors applicable to the standing inquiry:

- (1) property ownership;
- (2) whether the defendant has a possessory interest in the thing seized;
- (3) whether the defendant has a possessory interest in the place searched;
- (4) whether he has a right to exclude others from the place;
- (5) whether he has exhibited a subjective expectation that the place would remain free from governmental invasion;
- (6) whether he took normal precautions to maintain his privacy; and
- (7) whether he was legitimately on the premises.

Id. The Fifth Circuit, using these factors, found that Haydel had a reasonable expectation of privacy in the contents of a box stored under a bed at his parents'

residence; he had a key, permission to enter, unencumbered access, and the authority to exclude others. This court utilized the same factors in State v. Woods, 806 S.W.2d 205, 208 (Tenn. Crim. App. 1990). This court has recognized that under appropriate circumstances "an individual may have such a legitimate expectation of privacy in another person's residence." State v. Turnbill, 640 S.W.2d 40, 45 (Tenn. Crim. App. 1982). Here, the state argued that Wheeler had no standing because he had no connection to the Wright residence and, by testimony or otherwise, had made no claim to the box or its contents.

Based on the evidence presented at the suppression hearing, we conclude that Wheeler had no standing to object to the search of the box. Our supreme court has addressed this issue in Roberge:

It is fundamental that one challenging the reasonableness of a search or seizure has the burden of establishing a legitimate expectation of privacy in the place or property which is searched. One does not have automatic standing to challenge a search simply because he is convicted of a possessory offense. Further, one accused of a criminal offense may testify at a suppression hearing without incurring the risk that his testimony will be used against him by the prosecution as part of its case in chief. Therefore, in our opinion, it was incumbent upon [the defendant] to establish in some way that he had some claim to or interest in the [item seized]....

State v. Roberge, 642 S.W.2d 716, 718 (Tenn. 1982)(citations omitted). In Roberge, our supreme court found the defendant did not have standing because there was evidence that the item seized belonged to someone else. Id. In that circumstance, it was incumbent upon the defendant to testify in order to establish his standing. Id.

In our view, Wheeler has failed to establish standing. Because he arrived at the Wright residence with the box in his possession, he apparently had

only a temporary, "possessory interest." See State v. Wood, 806 S.W.2d at 208. The box was sealed. Although ownership of the box may be questionable, Wheeler helped carry the box to Wright's inside garage, a place in which Wheeler had no interest whatsoever. By all appearances, Wright accepted delivery and helped store the box. Wheeler was in the living room when officers arrived. An out-of-state resident, Wheeler was likely a short-term guest at the residence, at best. His use of a tractor trailer, a common means of commercial transportation, indicates nothing more than a duty to transport and deliver. Those obligations appear to have been fulfilled by the time officers entered the premises.

Both defendants contend the affidavit in support of the search warrant was insufficient to establish the informant's reliability. Initially, an affidavit is an indispensable prerequisite to the issuance of any search warrant. Tenn. Code Ann. § 40-6-103; State ex rel. Blackburn v. Fox, 200 Tenn. 227, 230, 292 S.W.2d 21, 23 (1956). It must establish probable cause. Tenn. Code Ann. § 40-6-104; Tenn. R. Crim. P. 41(c). Probable cause has been generally defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act. See Lea v. State, 181 Tenn. 378, 380-81, 181 S.W.2d 351, 352 (1944).

Also, fundamental to the issuance of a search warrant is the requirement that the issuing magistrate make an independent determination that probable cause exists. See State v. Moon, 841 S.W.2d 336, 337 (Tenn. Crim. App. 1992). Because the magistrate must make an independent determination, it is imperative that the affidavit contain more than conclusory allegations. "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." State v. Moon, 841 S.W.2d at 338 (quoting United States v. Ventresca, 380

U.S. 102, 108-09 (1965)).

The general rule is that if the information in the affidavit is supplied by a confidential informant, the adequacy of the affidavit is measured by a two-pronged test:

(1) whether the affidavit contains the basis of the informant's knowledge (the "basis of knowledge prong"); and

(2) whether the affidavit includes a factual allegation that the informant is credible or the information is reliable (the "veracity prong").

State v. Jacumin, 778 S.W.2d 430, 432, 436 (Tenn. 1989)(relying upon Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969)).

In Aguilar, the United States Supreme Court held that a search warrant was improvidently issued by the magistrate because the affidavit did not contain any underlying circumstances indicative of illegal activity or any facts disclosing the credibility of the informant or the reliability of the information given. 378 U.S. at 114. Although the United States Supreme Court no longer employs the Aguilar-Spinelli test, our supreme court has determined that the test, "if not applied hypertechnically, provide[s] a more appropriate structure for probable cause inquiries incident to the issuance of a search warrant ... [and] is more in keeping with the specific requirement of Article I, Section 7 of the Tennessee Constitution" State v. Jacumin, 778 S.W.2d at 436.

A conclusory allegation of the informant's reliability is insufficient to satisfy the veracity prong. Spinelli v. United States, 393 U.S. at 416. "It disallows any evaluation by the magistrate and requires that the magistrate accept the affiant's conclusions not only that the prior information was credible but also that it

was relevant and indicative of reliability. By its nature, such an allegation voids the magisterial function." State v. Stephen Udzinski, Jr., No. 01C01-9212-CC-00380, slip op. at 8 (Tenn. Crim. App., at Nashville, Nov. 18, 1993). Thus, the affidavit must include the specific underlying circumstances which establish the reliability of the confidential informant.

Here the affidavit alleged that "there has been a previous occasion, or occasions, on which the same informer has given information of violation of law of the state, which information thereafter was found to have been accurate and reliable." We find this allegation to be sufficient. In State v. Jacumin, 778 S.W.2d at 436, our supreme court stated the informant's reliability could be established by an allegation that the informant "had given drug-related information in the past which had proven to be accurate." This court can find no distinction between that allegation and the allegation in this case. Because we find the affidavit established probable cause, the conviction of Wright is affirmed.

Wheeler also argues that the search warrant was invalid because it did not meet the requirements for an anticipatory search warrant. Despite having concluded that Wheeler lacked standing, we will consider both this contention and the next. Our supreme court has embraced the use of "anticipatory search warrants." State v. Coker, 746 S.W.2d 167, 172 (Tenn. 1987). Such warrants do not violate the fourth amendment if they are executed following delivery of the contraband. State v. Wine, 787 S.W.2d 31, 33 (Tenn. Crim. App. 1989). "The affidavit should inform the magistrate that the known or suspected contraband will be delivered in the immediate future and the basis for the affiant's knowledge that the item will be delivered." Id. (citing United States v. Outland, 476 F.2d 581 (6th Cir. 1973)). For example, the Coker court found the affidavit in support of the

anticipatory warrant to be sufficient where the affiant specifically alleged how the item to be seized would arrive on the premises to be searched. State v. Coker, 746 S.W.2d at 172.

This court has also observed that if the delivery is not controlled by the government, “there is a greater possibility that the expected drugs will not in fact arrive. In such circumstances, the magistrate should require a particularized showing of strong reason to believe the contraband will in fact be on the targeted premises at the time the warrant is executed.” State v. Ronald Charles Coleman, No. 03C01-9105-CR-00143, slip op. at 3 (Tenn. Crim. App., at Knoxville, Jan. 9, 1992) (quoting Riviera v. United States, 928 F.2d 592, 603 (2nd Cir. 1991)).

Applying these guidelines to the present case, we would have held that the search was unlawful. The affidavit does not include any information about an anticipated delivery of the marijuana. Thus the magistrate had no basis upon which to issue an anticipatory search. The only information available was that the defendant Wright had marijuana in his possession some three days before the issuance of the May 28 warrant.

Nothing was alleged about how the contraband would arrive at the premises or how the officer knew the contraband would arrive. In fact, the issuing magistrate could not have been aware of the officer’s intention to wait on the arrival of more marijuana before executing the search. Thus, there was never a probable cause determination for an anticipatory search. Officer Williams undertook that on his own. The search violated a basic requirement: “that the issuing magistrate make a judicial determination, that is, a neutral and detached judgment, that probable cause is shown.” State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App.

1992). Officer Williams exceeded the authority granted by the magistrate and, upon receiving new information about the large delivery, should have sought a second warrant.

Wheeler's final claim is that the search exceeded the scope of the warrant. In State v. Thomas, 818 S.W.2d 350, 359 (Tenn. Crim. App. 1991), our court adopted standards for determining when officers executing a search warrant may lawfully search the personal effects of a visitor:

- (1) if the visitor's personal items might serve as a plausible repository of the object of the search, it may nonetheless be seized unless officers know the property belongs to the visitor;
- (2) if officers know the property belongs to the visitor, they may not rely on the authority conferred by the search warrant even though it is a plausible repository for the contraband; and
- (3) if someone within the premises has had the opportunity to conceal the contraband within the personal effects of the visitor immediately prior to the execution of the search warrant, officers may nonetheless conduct the search.

Our court adopted the following rationale for its holding in Thomas:

[P]olice cannot realistically be expected to avoid searching the property of a mere visitor to the premises unless they are aware of its ownership. Absent a requirement of such awareness, the effective execution of a warrant to search a place would be impossible since the police could never be sure that a plausible repository for items named in the warrant belongs to a resident, and hence is searchable, or to a non-resident, and hence is not searchable. Because of this, without notice of some sort of the ownership of a belonging, the police are entitled to assume that all objects within the premises lawfully subject to search under a warrant are a part of these premises for the purpose of executing the warrant....

State v. Thomas, 818 S.W.2d at 360 (quoting State v. Nabarro, 525 P.2d 573, 576-77 (1974)) (emphasis added in Thomas).

Here, the officers knew that Wheeler delivered the sealed box to the Wright residence but they could not determine ownership under these circumstances. Wheeler, a visitor to the area, parked in the driveway and helped carry the box into Wright's garage. Those acts suggest a transfer of possession. While leaving some doubt as to ownership, the facts would have entitled the officers, in our view, to assume the object was a part of the premises. Thus, officers would not have exceeded the scope of the search by merely looking inside the box; it is the anticipatory nature of the search warrant that violates art. I, § 7 of the Tennessee Constitution or the fourth amendment to the United States Constitution.

This analysis presents a bit of a dilemma. Here, Wheeler's conviction would have been reversed had he been able to establish standing. While the defendant Wright would have ordinarily been entitled to relief, he did not challenge the validity of the warrant except as to the reliability of the informant. Yet the ground which would have entitled Wheeler to relief was not preserved by Wright under Rule 37(b)(2). Thus, the requirements of State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988), as recently reaffirmed in State v. Sheryl L. Pendergrass, _____ S.W.2d _____, No.01S01-9507-CR-00110 (Tenn., at Nashville, Sept. 16, 1996) must prevail. In Pendergrass, this court reviewed a certified question of law where there had been "substantial[] compli[ance]" with Preston and Rule 37(b). Id., slip op. at 2. Noting that the requirements of Preston are mandatory, our supreme court held it was improper for this court to address the issue. Id., slip op. at 7.

This court cannot address an issue not properly preserved for appeal. Id. Accordingly, both convictions are affirmed.

Gary R. Wade, Judge

CONCUR:

Joseph M. Tipton, Judge

William M. Barker, Judge