

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92966

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AUGUSTUS TURNER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509482

BEFORE: Boyle, J., Gallagher, A.J., and Dyke, J.

RELEASED: March 25, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Following a jury trial, defendant-appellant, Augustus Turner, was convicted of a single count of drug possession, in violation of R.C. 2925.11, and sentenced to 12 months in prison. Prior to trial, he moved to suppress the drugs and accessories that the police recovered at his residence on the grounds that the underlying search warrant was defective. The trial court denied his motion, which Turner appeals, raising the following sole assignment of error:

{¶ 2} “The trial court erred in failing to suppress any and all evidence seized from the appellant’s residence.”

{¶ 3} Finding no merit to the appeal, we affirm.

Affidavit in Support of Search Warrant

{¶ 4} On April 9, 2008, Cleveland police secured a “night season” search warrant to search Turner’s residence at 3343 East 123rd Street and his person based on the sworn statements of Cleveland detective Robert McKay.

{¶ 5} McKay’s affidavit swore, inter alia, that within “the past week Cleveland police received information from a CRI that a black male named ‘Gus’ was selling crack cocaine out [3343 East 123rd Street]” — described as “a two story, single-family tan with brown trim house.” McKay further averred that within the past 72 hours and during the “night season,” the Cleveland police conducted a controlled purchase of crack cocaine from this location using this same CRI. McKay stated that the CRI was searched prior to the controlled buy, determined to be carrying no drugs, and issued a sum of money from which the serial

numbers had been recorded. McKay then drove to the area of 3343 East 123rd Street and dropped off the CRI, who remained under police surveillance.

{¶ 6} McKay further averred as to the facts surrounding the controlled buy at the residence: “CRI approached the front door, knocked on the door and was let into the house. The CRI stayed a short period of time and then exited the house and returned to affiant at a pre-determined location,” wherein he “handed to affiant a quantity of suspected crack cocaine which the CRI stated was purchased from ‘Gus’ within the house. The CRI described ‘Gus’ as an older black male, approximately six feet tall and 200 pounds.”

{¶ 7} The affidavit stated McKay’s basis for believing that the CRI was reliable: “CRI has been known to the Fourth District Vice Unit for over the past six months * * * [and] that this CRI participated in numerous controlled buys and has consistently provided affiant and the Cleveland police with information that has proven to be both accurate and reliable.”

{¶ 8} The affidavit also indicated that the suspected crack purchased by the CRI had been submitted to Cleveland’s Scientific Investigation Unit for testing but that the police had not yet obtained the results.

{¶ 9} Lastly, McKay averred that the police have identified “Gus” to be Augustus Turner, (d.o.b. 5/10/1952), who has a criminal history of selling PCP and marijuana, and that 3343 East 123rd Street is listed as Turner’s residence on his driver’s license.

{¶ 10} The trial court signed the warrant, and the police executed it that same day at approximately 5:45 p.m. Once inside the residence, the police confiscated a bag containing approximately 2.28 grams of cocaine, which was found in the upstairs bathroom toilet. The police also recovered suspected crack pipes containing cocaine residue found in the residence. Turner was subsequently indicted for drug trafficking, drug possession, and tampering with evidence. At trial, he was acquitted of drug trafficking and tampering with evidence but found guilty of drug possession.

Sufficiency of the Affidavit

{¶ 11} In his sole assignment of error, Turner argues that the trial court should have granted his motion to suppress because the underlying affidavit failed to demonstrate probable cause to support the warrant. We disagree.

{¶ 12} Before a search warrant may be issued, probable cause must be established. Crim.R. 41(C); the Fourth Amendment to the United States Constitution; Section 14, Article I, Ohio Constitution.

{¶ 13} When “determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, ‘[t]he 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.’” *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph

one of the syllabus, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.E.2d 527.

{¶ 14} In deciding whether a search warrant was adequately supported by probable cause, “the duty of a reviewing court is simply to ensure that the [issuing judge] had a substantial basis for concluding that probable cause existed.” *George*, 45 Ohio St.3d 325, paragraph two of the syllabus. This standard of review affords a great deal of deference to the issuing judge and prohibits us from conducting a de novo review and substituting our judgment for that of the issuing judge. *Id.*

{¶ 15} To establish probable cause for issuance of a search warrant, an affidavit must contain sufficient information to allow a magistrate to draw the conclusion that evidence is likely to be found at the place to be searched. *State v. Cabrales*, 1st Dist. No. C-050682, 2007-Ohio-857, ¶22, citing *United States v. Ventresca* (1965), 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684. Indeed, a search warrant based on a police officer’s affidavit is legally sufficient if the totality of the circumstances establishes a “fair probability that contraband or evidence of a crime will be found in a particular place.” *Gates*, 462 U.S. at 238, 103 S.Ct. 2317.

{¶ 16} Turner argues that the affidavit in support of the search warrant was wholly lacking because it offered no more than “one link” between the police’s suspicion of criminal activity and his residence: “one isolated purchase of suspected crack cocaine from the residence completed by an unnamed

‘informant.’” Relying on this court’s decision in *State v. Kelly*, 8th Dist. No. 91137, 2009-Ohio-957, Turner contends that the single incident is insufficient to support the warrant. He further cites to *United States v. Elliot* (S.D. Ohio 1984), 576 F.Supp. 1579, in support of this argument.

{¶ 17} We find Turner’s reliance on these cases misplaced; both are factually distinguishable from the instant case. In *Kelly*, we affirmed the trial court’s decision granting Kelly’s motion to suppress, holding that the police’s discovery of a large plastic bag with suspected marijuana residue in the course of a trash pull and general allegations of pedestrian traffic, noise, and drug activity were insufficient to warrant an intrusion into one’s residence. We specifically noted that the police failed to conduct any followup investigation, surveillance, or a controlled buy at the residence, despite having received citizen complaints of pedestrian traffic, noise, and drug activity over a six- to nine-month period. *Id.* at ¶17. We further noted that the citizen complaints were also insufficient because they were not made close in time to the issuance of the warrant and therefore were stale. *Id.* at ¶18.

{¶ 18} Similarly, *Elliot* involved the police’s reliance on a single trash pull for purposes of securing a search warrant of Elliot’s residence. 576 F.Supp. 1579. Although the affidavit also described anonymous complaints of drug activity and the affiant’s own surveillance of the property, it failed to specify the time period and therefore could not be considered. *Id.* at 1581. Left solely with evidence of an unspecified “quantity of partially smoked marijuana cigarettes and several

stems from marijuana stalks” found in Elliot’s trash, the court concluded that the discarded contraband standing alone was insufficient to support a determination of probable cause. *Id.* The court reasoned that the discarded contraband revealed only a *single* past use of marijuana, which provides no basis to conclude that marijuana is still in the home. *Id.* at 1582.

{¶ 19} Conversely, the affidavit at issue in this case neither suffers from the temporal deficiencies found in *Elliot* nor the broad generalizations at issue in *Kelly*. Nor does this case involve a single trash pull from the tree lawn. Here, the police successfully conducted a controlled buy at Turner’s residence three days before they obtained the search warrant. Such facts have been routinely recognized to be enough to establish probable cause regarding the existence of the same contraband in the location. See, e.g., *State v. Armstead*, 9th Dist. No. 06CA0050-M, 2007-Ohio-1898; *State v. Gilbert*, 4th Dist. No. 06CA3055, 2007-Ohio-2717. Indeed, the outcome may have been different in *Kelly* had the police conducted a successful controlled buy three days prior to securing the search warrant. Further, the controlled buy was precipitated by the CRI’s report a week prior to the issuance of the search warrant that Turner was selling drugs out of his house. This information, coupled with the controlled buy, evidences more than simply a single occurrence of drug activity, thereby refuting the concern stated in *Elliot*.

{¶ 20} As for Turner’s claim that the affidavit is silent as to the CRI’s veracity, we disagree. Det. McKay specifically stated that he believed the CRI to

be reliable based on his experience with the CRI in the last six months where the CRI has consistently provided accurate and reliable information.

{¶ 21} Accordingly, applying our deferential standard of review, we conclude that the judge in this case had a substantial basis for concluding that probable cause existed for issuing the search warrant.

{¶ 22} Turner's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
ANN DYKE, J., CONCUR