[Cite as *State v. Evans*, 2015-Ohio-1022.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101485

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TINA EVANS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577186-A

BEFORE: E.T. Gallagher, J., E.A. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 19, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Tina Evans ("Evans"), appeals the denial of her pretrial motions to suppress evidence and to disclose the identity of a confidential informant. Evans also appeals her sentence. She raises three assignments of error for our review:

> 1. The trial court erred in denying defendant's motion to suppress.
>
> 2. The trial court erred in denying defendant's motion to reveal the identity of the confidential informant and to require the state to reveal any agreement entered between the state and confidential informant.
>
> 3. The trial court abused its discretion by imposing a prison sentence contrary to R.C. 2929.14 and the purposes and principles of the felony sentencing guidelines.

We find no merit to the appeal and affirm.

I. Factual and Procedural History

{¶2} Evans was charged with two counts of drug trafficking, in violation of R.C. 2925.03(A)(2), with juvenile specifications; two counts of drug possession, in violation of R.C. 2925.11(A); one count of possession of criminal tools, in violation of R.C. 2923.24(A); and three counts of misdemeanor child endangering, in violation of R.C. 2919.22(A). The charges resulted from a search of Evans's home where Cleveland detectives found a large quantity of cocaine.

{¶3} Prior to trial, Evans filed a motion to suppress evidence of the drugs found in her home pursuant to a search warrant, arguing that the affidavit presented to the judge for the warrant lacked probable cause. She also filed a motion to disclose the identity of a confidential informant ("CI"), who provided the factual basis for the search warrant.

{¶4} At a hearing on the motions, Detective John Lolly ("Lolly"), the affiant of the search warrant affidavit, testified to the facts alleged in the affidavit and to the search of Evans's home. Lolly received information from a CI that Evans was selling cocaine from her home located at 3553 Trent Avenue in Cleveland. The CI identified Evans's house as well as the make, model,

and license plate number of the vehicle she drove to make drug deals. Lolly independently verified this information and confirmed that the license plate on the vehicle was registered in Evans's name at the Trent Avenue address.

{¶5} After verifying this information, Lolly instructed the CI to telephone Evans to set up a "controlled buy." During the call, which was monitored by police, the CI arranged to purchase cocaine from Evans at the corner of Fulton Road and Clark Avenue in Cleveland. Lolly searched the CI immediately before the buy to make sure he had no cocaine, contraband, or money. Detectives also provided the CI with an amount of United States currency, the serial numbers of which were recorded, to buy drugs from Evans.

{¶6} Detective Mitchell ("Mitchell")[1] subsequently transported the CI to the meeting location, where Detective Fairchild ("Fairchild") was already parked in an undercover police vehicle. Detectives Mitchell and Fairchild watched the CI's actions as he purchased cocaine from Evans. Although detectives did not observe Evans leave her home prior to the sale, they observed her turn left onto Fulton Road from Trent Avenue and proceed to Clark Avenue, which is located approximately two blocks north of Trent.

{¶7} Mitchell and Fairchild continued to monitor the CI as he returned to Mitchell's undercover police vehicle after the transaction was complete. In accordance with police procedures, the detectives transported the CI to the Second District police station where they searched him and confirmed that he purchased cocaine from Evans. Meanwhile, other undercover officers followed Evans, who immediately returned to her home on Trent Avenue after the sale.

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[1] The record does not contain the first names of either Detective Mitchell or Detective Fairchild.

{¶8} Lolly testified that the controlled buy occurred on a Friday. He prepared the affidavit required to obtain the search warrant over the weekend, and presented it to a judge, who issued the warrant on the following Monday. Lolly further stated that police obtained and executed the search warrant within 72 hours of the controlled buy. (Tr. 50.) During the search of Evans's home, police found cocaine in Evans's bedroom, where the CI had told police it was located.

{¶9} Based on this evidence, the trial court denied Evans's motion to suppress. The court also denied Evans's motion to reveal the identity of the CI and the nature of any agreement the CI had with police. Evans subsequently pleaded no contest to all the counts in the indictment. The court merged Counts 1 and 2, and Counts 3 and 4, into two convictions instead of four. The court sentenced Evans to a nine-year prison term on Count 1, a first-degree felony trafficking charge, and a 24-month prison term on Count 3, a third-degree felony trafficking charge. The court imposed a 12-month prison term on Count 5, which alleged possession of criminal tools. The court ordered the prison terms to be served concurrently. Finally, the court imposed fines on Counts 6 through 8, which were misdemeanor child endangering charges.

II. Law and Analysis

A. Motion to Suppress

{¶10} In the first assignment of error, Evans argues the trial court erred in denying her motion to suppress evidence. She contends the search warrant affidavit lacked the probable cause required by the Ohio and United States constitutions for a lawful search.

{¶11} The Fourth Amendment to the U.S. Constitution and Article I, Section 14 of the Ohio Constitution prohibit the government from conducting unreasonable searches and seizures of persons or their property. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968);

State v. Andrews, 57 Ohio St.3d 86, 87, 565 N.E.2d 1271 (1991). To ensure that a search is reasonable, the Fourth Amendment requires (1) that the government obtain a warrant from a neutral and detached magistrate prior to the search, and (2) that the warrant is issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). *See also* Crim.R. 41(C).

{¶12} The warrant requirement is based on the "basic constitutional doctrine that individual freedom will best be preserved through a separation of powers * * * among the different branches and levels of the Government." *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). A governmental search and seizure should represent both law enforcement's efforts to gather evidence of criminal activity and a magistrate's judgment "that the collected evidence is sufficient to justify invasion of a citizen's private premises." *Coolidge v. N.H.*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). By requiring a magistrate to make the probable cause determination instead of "the officer engaged in the often competitive enterprise of ferreting out crime," the Fourth Amendment "minimizes the risk of unreasonable assertions of executive authority." *Sanders* at 759.

{¶13} The test for probable cause it not amenable to any precise definition or quantification. It is "a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules." *Gates* at 232. "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id*. at 244.

{¶14} The magistrate issuing the search warrant must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair

probability that contraband or evidence of a crime will be found in a particular place." *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), paragraph two of the syllabus, citing *Gates* at 238-239. Therefore, the affidavit must "particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located." Crim.R. 41(C); *see also* R.C. 2933.23.

{¶15} The court reviewing the sufficiency of probable cause in a search warrant affidavit must determine whether the issuing judge or magistrate had a substantial basis to conclude that probable cause existed. *George* at paragraph two of the syllabus. "[T]rial and appellate courts should afford great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *Id.*

{¶16} Evans argues the search warrant for her house lacked sufficient facts to support a probable cause finding because there was no evidence that contraband would be found inside her home. Evans contends that since the controlled buy occurred at an offsite location, and police never conducted surveillance on her house, there was no evidence that Evans possessed drugs in her home.

{¶17} Evan relies on *State v. Gales*, 143 Ohio App.3d 55, 757 N.E.2d 390 (8th Dist.2001), to support her argument. In *Gales*, this court found that an affidavit lacked a sufficient factual basis to justify the issuance of a search warrant to search the defendant's home, in part because there was no evidence connecting drug activity to the defendant's address. The police in that case obtained a search warrant after a confidential reliable informant ("CRI") cooperated with police in two controlled buys of heroin.

{¶18} This court determined that the first of two controlled buys was "stale" because it occurred three months before police applied for the search warrant. *Id*. at 62. The second buy occurred within 72 hours of the search warrant application, but the only connection between the second buy and the defendant was the fact the defendant brokered the deal; he did not actually make the sale. *Id*. Although the CRI had arranged to purchase heroin from the defendant, an unidentified black male, driving a vehicle that was not registered to the defendant's address, met the CRI at an offsite location and completed the sale. Although police performed surveillance of the defendant's residence and observed the defendant coming in and out of the house, there was nothing to connect the sale of heroin with his home. *Id*.

{¶19} Both parties referred to the facts alleged in the affidavit during their direct and cross-examinations of the affiant who prepared it. However, the affidavit was not admitted into evidence and was not made part of the record. Under App.R. 12(A), we are limited to reviewing the parts of the record that are properly before us. Therefore, "[w]hen an affidavit filed in support of an application for a search warrant is not offered into evidence or otherwise preserved for appeal, we cannot review its substance." *State v. Alexander*, 151 Ohio App.3d 590, 2003-Ohio-760, 784 N.E.2d 1225 (8th Dist.). We must therefore presume that the court's basis for finding probable cause to issue the search warrant was correct. *Id*.

{¶20} Nevertheless, our review of the evidence from the suppression hearing supports the trial court's finding of probable cause. According to Lolly's testimony, the CI told police that Evans was selling cocaine out of her home on Trent Avenue. The CI identified Evans's house and the vehicle she drove when she sold drugs. Although the CI had not previously provided accurate information to police and was not a "confidential reliable informant," Detective Lolly independently investigated the CI's information and confirmed that the Jeep the CI had identified

as Evans's vehicle was registered in Evans's name at her Trent Avenue address. Police also observed a controlled buy in which Evans sold cocaine directly to the CI.

{¶21} Unlike *Gales*, where an unidentified person made the sale, police observed Evans herself sell the cocaine to the CI. Police observed Evans turn off of her street and drive two blocks north to the meeting location at the time of the controlled buy. They also observed Evans return to her home immediately after the sale was complete. Under these circumstances, it is reasonable to conclude that Evans more likely than not kept the cocaine in her house. Police applied for, obtained, and executed the search warrant within 72 hours of the buy. In contrast to the facts involved in *Gales,* the search warrant affidavit in this case was not stale and demonstrated a fair probability that police would find cocaine in Evans's home. Therefore, the affidavit contained the necessary facts to support the magistrate's probable cause finding, and the trial court properly denied the motion to suppress.

{¶22} The first assignment of error is overruled.

B. Informant's Identity

{¶23} In the second assignment of error, Evans argues the trial court erred in denying her motion to reveal the identity of the CI and any agreement the CI had with police in exchange for his cooperation. She contends she needed to know the CI's identity in order to present an effective defense.

{¶24} An accused is entitled to disclosure of the identity of a CI when "the testimony of the CI is vital to establishing an element of the crime or would be helpful or beneficial to the accused in preparing or making a defense to criminal charges." *State v. Williams*, 4 Ohio St.3d 74, 446 N.E.2d 779 (1983), syllabus; *accord Roviaro v. United States*, 353 U.S. 53, 60-62, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). However, the decision whether to order disclosure of an CI's

identity involves the balancing of competing interests. The trial court must balance the accused's right to confront and cross-examine his accusers against the public interest in protecting the flow of information regarding criminal activity to law enforcement. *Williams* at 75. In making this determination, the court must consider "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro* at 62.

{¶25} The defendant bears the burden of establishing the need for disclosure. *State v. Brown*, 64 Ohio St.3d 649, 653, 597 N.E.2d 510 (1992). Generally, when the degree of the CI's participation is such that the CI virtually becomes the state's witness, the balance swings in favor of requiring disclosure of the CI's identity. *Williams* at 75. Conversely, where disclosure would not be helpful or beneficial to the accused, the identity of the CI need not be revealed. *Id.*

{¶26} Although the CI's identity must be disclosed when the CI's testimony is vital to the state's case or would be helpful in preparing a defense, the defendant must set forth more than mere speculation that "the informer might somehow be of some assistance in preparing the case." *State v. Parsons*, 64 Ohio App.3d 63, 69, 580 N.E.2d 800 (4th Dist.1989). The trial court's judgment as to whether disclosure of an CI's identity is necessary will not be reversed on appeal absent an abuse of discretion. *State v. McKoy*, 8th Dist. Cuyahoga No. 93363, 2010-Ohio-522, ¶ 10.

{¶27} Here, the CI's testimony was not necessary to establish any of the elements of the offenses charged in the indictment. The CI's involvement in the case was limited to establishing the probable cause needed to obtain the search warrant. Moreover, Evans has not articulated how disclosure of the CI's identity would have assisted her defense. In her pretrial motion, she simply concluded without explanation that "the identity of the CI will be helpful and beneficial to

the accused in the preparation of her defense." As previously stated, mere speculation that the CI's identity might be helpful is insufficient to meet the defendant's burden of establishing the need for disclosure. *Parsons* at 69. Therefore, Evans failed to establish that her need for disclosure outweighed the public interest in maintaining the free flow of information about criminal activity to the police.

{¶28} Evans's motion to reveal any agreement between the state and the CI is also without merit. Evans would not have been entitled to knowledge of any agreement between the CI and police unless she was entitled to knowledge of the CI's identity. Moreover, the record suggests there was no agreement between police and the CI.

{¶29} Accordingly, the second assignment of error is overruled.

C. Sentencing

{¶30} In the third assignment of error, Evans argues the trial court abused its discretion by imposing a prison sentence that violates the purposes and principles of the felony sentencing guidelines set forth in R.C. 2929.11(A) and 2929.12. She contends that because she did not commit a violent crime, the trial court abused its discretion by imposing a lengthy, nine-year prison sentence.

{¶31} R.C. 2953.08 provides the grounds on which a defendant may appeal from a felony sentence. Under R.C. 2953.08(A)(4), a criminal defendant may appeal his sentence if it is contrary to law, and the statute provides two separate grounds for claiming that a sentence is contrary to law. *State v. Bonds*, 8th Dist. Cuyahoga No. 100481, 2014-Ohio-2766. First, a sentence is contrary to law if it falls outside the statutory range for the particular degree of offense. *State v. Holmes*, 8th Dist. Cuyahoga No. 99783, 2014-Ohio-603,¶ 10. Second, a sentence is contrary to law if the trial court fails to comply with sentencing statutes. *Id*. Thus, a

sentence is contrary to law if the court fails to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. *State v. Hodges*, 8th Dist. Cuyahoga No. 99511, 2013-Ohio-5025, ¶ 7.

{¶32} R.C. 2929.11(A) provides that the "overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes." R.C. 2929.11(B) requires that, in addition to achieving these goals, a sentence must be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim."

{¶33} R.C. 2929.12 provides a non-exhaustive list of factors the court must consider in determining the relative seriousness of the underlying crime and the likelihood that the defendant will commit another offense in the future. *State v. Townsend*, 8th Dist. Cuyahoga No. 99896, 2014-Ohio-924, ¶ 11, citing *State v. Arnett*, 88 Ohio St.3d 208, 213, 2000-Ohio-302, 724 N.E.2d 793. The factors include (1) the physical, psychological, and economic harm suffered by the victim, (2) the defendant's prior criminal record, (3) whether the defendant shows any remorse, and (4) any other relevant factors. R.C. 2929.12(B) and (D).

{¶34} Although the trial court must consider the sentencing guidelines outlined above when imposing a felony sentence, it is not required to use any particular language or make any specific findings on the record. *State v. Brown*, 8th Dist. Cuyahoga No. 100874, 2014-Ohio-4381, ¶ 10. The court's consideration of the criteria set forth in R.C. 2929.11(A) and 2929.12 may be presumed unless the defendant affirmatively shows otherwise. *State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13.

{¶35} In this case, it is undisputed that Evans's nine-year sentence is within the permissible statutory range for a first-degree felony.[2] At the sentencing hearing, the parties discussed Evans's criminal record, which included a prior drug conviction. The court stated on the record that it considered Evans's criminal record and the fact that she was on probation when she committed the offenses giving rise to this case. Although the court did not expressly state on the record that it considered all the sentencing factors and guidelines set forth in R.C. 2929.11(A) and 2929.12, it stated in the sentencing entry that it "considered all the required factors of law," and that it found that "prison is consistent with the purpose of R.C. 2929.11." Therefore, the record indicates that the court complied with the requirements of R.C. 2929.11 and 2929.12, and Evans has not given us a reason to conclude otherwise.

{¶36} Accordingly, the third assignment of error is overruled.

III. Conclusion

{¶37} The trial court properly denied Evans's motion to suppress evidence where the affidavit for the search warrant provided probable cause for the search of her home. The trial court's judgment denying Evans's motion to reveal the identity of the CI was also appropriate because Evans failed to establish that knowledge of the CI's identity would have helped her defense. Finally, the sentence Evans received was lawful because it fell within the statutory range and the record demonstrated that the trial court complied with the requirements of R.C. 2929.11 and R.C. 2929.12.

{¶38} Judgment affirmed.

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[2] Under R.C. 2929.14(A)(1), the maximum prison term for a first-degree felony is 11 years. Therefore, a nine-year sentence is within the statutory range.

It is ordered that appellee recover from 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.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR