

COMMONWEALTH OF PENNSYLVANIA
v. KEVIN P. ZULLINGER, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action, No. 405 of 2005

Search and Seizure; Search Warrants; Probable Cause; Confidential Informants

1. In order to go beyond the four corners of the search warrant, a defendant must make a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the warrant and that the allegedly false statement is necessary to the finding of probable cause.
2. Allegations of negligence or innocent mistake are insufficient to go beyond the four corners of the search warrant.
3. When a person says he can enter a residence and purchase marijuana for the police and he then in fact enters that residence and returns with marijuana which he sells to the police and when the police recover exactly what he told them they would find in the home upon executing a search warrant, the reliability of the statements and/or his veracity is beyond question.
4. When a defendant is charged with possession and not delivery, the statements of one who told the police he could purchase marijuana from the defendant's residence, purchased marijuana from the defendant's residence, and then sold it to the police, are not material.
5. The standard for determining whether probable cause exists for the issuance of a search warrant is the totality of the circumstances, and the information offered to establish probable cause must be viewed in a common sense, non-technical manner.

Appearances:

Heather L. Adams, Esq., *Deputy Attorney General*

Frederick Lester, Esq., *Counsel for Defendant*

OPINION

Walsh, J., June 23, 2005

Defendant Kevin P. Zullinger is charged with Possession with Intent to Deliver Marijuana^[1], Use of or Possession with Intent to Use Drug Paraphernalia^[2], and with Possession of a Controlled Substance^[3]. The Chief Deputy Attorney General for the Drug Strike Force Section brought the charges on March 29, 2005 and the charges were filed on April 5, 2005. Defendant, by and through his counsel, Frederick Lester, Esq., filed an Omnibus Pre-Trial Motion on May 5, 2005 seeking to suppress any and all statements and physical evidence obtained as a result of the search warrant executed on October 9, 2004 and seeking to compel the disclosure of the identity of a confidential informant, who supplied information

supporting the search warrant.

The underlying incident took place on October 9, 2004 on a search warrant issued October 8, 2004 upon an Affidavit of Probable Cause of that same date. Defendant was found in his residence upon execution of the search warrant.

Defendant's Omnibus Pre-Trial Motion asserts that on October 9, 2005 Defendant was the occupant of an apartment in which police conducted a search of the premises after obtaining a warrant based upon information provided to them by a confidential informant. Motion, paragraph 2. In his request to suppress statements and physical evidence, Defendant asserts that he believes "that the confidential informant must have been mistaken as to the identity of the perpetrator and the proper address, thus making him or her unreliable, as well as invalidating the warrant." Motion, paragraph 5. Defendant has claimed that any statements made and any physical evidence seized were obtained in violation of his rights found in the Pennsylvania and United States Constitutions. Motion, paragraph 7. In his Motion, in which he seeks to have disclosed to him the identity of the confidential informant, Defendant suggests that the confidential informant was mistaken as to the identity of the perpetrator as well as the address of the same. Motion, paragraph 8. Finally, Defendant questions the reliability of the confidential informant upon which a warrant was obtained to search the Defendant's home and he believes that it would be fair and just to have an opportunity to question the confidential informant as to what the confidential informant claims to have witnessed, if anything. Motion, paragraphs 9 and 10.

Hearing was scheduled and held on June 13, 2005. At that time, the Commonwealth tendered as its case-in-chief the warrant and the supporting two-page Affidavit. Present in court with the Commonwealth was the police officer affiant ("Affiant"). The defense presented no evidence.

Among the assertions laid out in the Affidavit of Probable Cause are the following: the Affiant obtained certain information in the Affidavit from an identified-by-number confidential informant and an undercover Pennsylvania State Police Officer ("police officer") regarding a specific residence located in the Borough of Chambersburg. Both the confidential informant and the police officer were working with the Chambersburg Police Department Crime Impact Team investigating drug activities occurring within the Borough of Chambersburg. The police officer reported that at 6:00 p.m. on October 7, 2004, he and the confidential informant picked up a black male who directed them to a specific residence on High Street where the black male stated he could get them some marijuana for thirty (\$30.00) dollars. The police officer and the confidential informant provided the black male with money to make the drug purchase and then dropped him off and watched him enter the designated residence. The residence is described by its address and physical appearance in the Affidavit of Probable Cause. The black male was in the residence for only a few minutes and he returned with marijuana, which he purchased for thirty-five (\$35.00) dollars. The black male reported that he negotiated the sale price from \$40.00 to \$35.00. The substance that the black male then delivered to the police officer and the confidential informant field-tested positive for marijuana.

The Affidavit further reports that investigation revealed the tenant of the specific residence to be Defendant Kevin Zullinger. The Affiant was familiar with Zullinger who had been arrested a number of times for drug offenses within the Borough. A review of Chambersburg Police Department records and criminal history records reflects that Defendant had been arrested in 1999 as a juvenile for Possession with Intent to Deliver Crack Cocaine. Again, on June 26, 2003, Defendant was arrested for Criminal Conspiracy to Commit Delivery and Delivery of a Counterfeit Substance, all of which occurred on January 4, 2003. During the June 2003 arrest, Defendant was found to be in possession of marijuana with intent to deliver and was charged with Possession with Intent and Possession of Drug Paraphernalia. The Affidavit further reports that the confidential informant has made previous drug buys while working as a confidential information for the State Police and has provided information to the police officer regarding drug dealers and activities.

At a suppression hearing, a defendant can challenge the veracity of facts establishing probable cause recited in an affidavit supporting a warrant through cross-examination of the police officer-affiant without any prior showing of the potential falsity of those facts. Commonwealth v. Hall, 451 Pa. 201, 302 A.2d 342 (1973); Commonwealth v. Bonasorte, 337 Pa. Super 332, 486 A.2d 1361 at 1368 (1984). Apparently, Defendant chose not to call Affiant, Officer Rosenberry, to test his veracity with respect to facts set forth in the Affidavit of Probable Cause.

Beyond that, we note that Defendant was not charged with Delivery; Defendant was charged only with Possession with Intent, a Paraphernalia charge and Possession of a Controlled Substance. That is, Defendant was charged with no drug transaction. Since Defendant is facing only "possession" charges and not "delivery" charges, the black male simply is not a material witness. In fact, the facts in the Affidavit effectively prove themselves: the black male said he could enter the residence and purchase marijuana for them and the black male in fact entered the residence and returned with marijuana which he then sold to

the confidential informant and the State Trooper. Further, upon executing the search warrant, the police recovered exactly what the black male told them they would find in the home and exactly what the black male purchased for them while he was in the home. The reliability of the statements of the black male and/or his veracity is, under the facts, beyond question.

We find the Commonwealth's analysis to be apt:

In order to go beyond the four corners of the search warrant, a Defendant must make a "substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the warrant, and [that] the allegedly false statement is necessary to the finding of probable cause." Commonwealth v. Miller, 518 A.2d 1187, 1194 (1986) (citing Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1998)). The court in Miller further noted that "[a]llegations of negligence or innocent mistake are insufficient." Id. Defense counsel did not cite or offer any false statement that was alleged to be included in the warrant, other than the mere mention of the Defendant's prior arrests. Clearly, based upon the foregoing legal standard, ... it is clear that Defendant did not meet the requirements necessary to entitle him to a hearing.

Second, the Commonwealth argues that the Affidavit of Probable Cause established sufficient facts for a magistrate to find probable cause for the issuance of the search warrant. The standard for determining whether probable cause exists for the issuance of a search warrant is the totality of the circumstances. Commonwealth v. Gray, 509 A.2d 476 (1985). A magistrate must 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..The information offered to establish probable cause must be viewed in a common sense, non-technical manner. Commonwealth v. Dean, 693 A.2d 1360 (Pa. Super. 1997) (citations omitted).

In Dean, an Affidavit of Probable Cause for the execution of a search warrant was issued based upon an informant's information that Defendant was selling drugs from his home and an additional controlled purchase made by the informant. Defense counsel argued that because the Affidavit did not contain any indication of the informant's basis of knowledge or reliability the warrant failed to establish probable cause. The Superior Court held that the controlled purchase out of the Defendant's residence corroborated the initial information given by the informant and that from that, "a magistrate could have concluded by a fair probability that drug selling was taking place at appellant's residence." Id. at 1366. The Court further noted that such corroboration provides a "substantial basis for crediting hearsay" Id. at FN 4.

The Commonwealth submits that the facts in the instant case are similar to those in Dean. As in Dean, the search warrant in the instant case is supported by the statements of an "unwitting" informant and a subsequent purchase of marijuana from the Defendant's residence. Pursuant to the holding in Dean, the "unwitting's" statement to the undercover Trooper that drugs could be purchased for the residence on High Street was substantially corroborated by the subsequent purchase of marijuana from 231 High Street. The statements are further corroborated by the fact that the current tenant had prior multiple arrests for drug felonies. Although it was not a confidential informant who made a "controlled purchase" out of the residence as in Dean, . . . this is a distinction without a difference. It is important to view the warrant in a common-sense and non-technical manner. Because a confidential informant is often expecting some consideration in return for making drug purchases for officers, some precautions must be taken to ensure the credibility of the informant. An "unwitting" informant, unlike a confidential informant, has nothing to gain, except profit, by participating in a drug delivery. Thus, an "unwitting" informant has no motive to deceive anyone as to the source of the drugs that are later turned over to an officer after a purchase is made. Therefore, given deference to the magistrate's decision, probable cause was established, because the "unwitting's" statements were substantially corroborated by a purchase of marijuana from Defendant's residence.

Commonwealth's letter brief at pp. 2-3.

Defendant claims that the affidavit is materially misleading because it fails to disclose that there

was another party on the lease to the subject premises. Defendant's brief at page 2. In fact, the Affiant noted that a check of records of the Chambersburg Police Department disclosed that the "resident/tenant is Kevin Zullinger." Affidavit of Probable Cause, paragraph 3. The Affiant checked records that were readily available to him. There is no evidence anywhere in these proceedings either that there was another resident or tenant of the subject premises or that any other resident or tenant of the subject premises had any kind of criminal record which would have caused that person's name to appear in records of the Chambersburg Police Department. In any event, the information is facially accurate. Defendant failed to establish that the Affidavit contains any misstatements, let alone deliberate and material misstatements. Defendant's argument, taken as a whole, simply does not make a case for a defective affidavit. Accordingly, we cannot conclude that the search warrant issued in this case was defective. Because the search warrant was not defective, there is no basis to suppress evidence obtained as a result of its execution.

For the reasons set forth above, and including the cogent reasoning and the authority cited by the Commonwealth, Defendant's Motion to Suppress will be denied and Defendant's Motion to have disclosed to him the identity of the confidential informant likewise will be denied.

ORDER OF COURT

June 23, 2005, upon consideration of the Defendant's Omnibus Pre-Trial Motion, the evidence, the arguments and briefs of the parties, and the law, it is ordered that the Defendant's Motion to Suppress Physical Evidence and Statements is denied. It is further ordered that the Defendant's Motion to have disclosed to him the identity of the confidential informant is denied. It is further ordered that the foregoing determinations shall be final, conclusive and binding at trial, except as otherwise provided by law.

^[1] 35 P.S. §780-113(a)(30).

^[2] 35 P.S. §780-113(a)(32).

^[3] 35 P.S. §780-113(a)(16).