

COMMONWEALTH OF PENNSYLVANIA
v. GERALD S. PRESTON, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 832-2006

Determining validity of search warrants, fatal defects; Staleness of evidence; Use of confidential informants

1. The reviewing court must afford the issuing magistrate "great deference" when reviewing an affidavit of probable cause and whether the issuance of the search warrant was proper. The reviewing court should determine whether there is a substantial basis for the issuance of a search warrant.
2. The failure to include an apartment number in an affidavit supporting a search warrant is not a fatal defect where the search warrant itself contained the apartment number.
3. In determining whether evidence is too stale to justify issuing a search warrant, the magistrate must determine whether there is a "fair probability" that the evidence exists at that location. This determination must be based on a totality of the circumstances.
4. When a confidential informant's claims can be corroborated, information given by that confidential informant can be considered reliable.

Appearances:

Jeremiah D. Zook, Esq., *Assistant District Attorney*

R. Paul Rockwell, Esq., *Assistant Public Defender*

OPINION

Walker, P.J., January 12, 2007

Facts

On March 23, 2006, Detective Darren North, an employee of the Franklin County District Attorney's Office, filed an affidavit of probable cause requesting a search warrant for the residence of Defendant Gerald Preston, 161 S. Fourth Street, Apt. 1, in Chambersburg, Franklin County, Pennsylvania. The affidavit also requested a search of any people present during the search, including Mr. Preston and a woman named Amy Johnson.

In that affidavit, Detective North explained why he believed a search warrant should issue. The search warrant application discusses the activities of Detective North, Trooper Snyder^[1], and a confidential informant.

The affidavit explains how within forty-eight hours of February 10, 2006, Detective North and a confidential informant went to 161 S. Fourth Street, where the confidential informant conducted a controlled buy. The affidavit, when discussing the activities of the informant, only lists the location as 161 S. Fourth Street, without specifying a specific apartment number. In the last paragraph, Detective North does indicate an apartment number. That apartment number also appears on the search warrant and was

the apartment searched by Detective North.

The affidavit described how, after being searched for contraband and given U.S. currency, the confidential informant entered 161 S. Fourth Street and returned shortly thereafter with a bag of suspected marijuana. The confidential informant also explained that he purchased the suspected marijuana from someone known to the informant as "G," a black male. Detective North conducted a field test on the suspect marijuana and determined that it was marijuana.

The affidavit also explains how a second controlled purchase of marijuana was made within forty-eight hours of March 20, 2006 at the same location. The process was similar, although Trooper Snyder worked with the confidential informant.

On this occasion, Trooper Snyder searched the confidential informant for contraband and then gave the confidential informant U.S. currency. The confidential informant entered 161 S. Fourth Street and returned shortly thereafter with a bag of suspected marijuana. Detective North conducted a field test on a sample of this bag; the test was positive for marijuana.

Detective North filed an affidavit of probable cause on March 23, 2006.[2] The magistrate was satisfied that probable cause existed for the issuance of a search warrant and signed a search warrant on March 23, 2006 at 2:00 p.m. Detective North executed the search warrant on March 24, 2006 at approximately 11:00 a.m. In the apartment, Detective North found a bong, a knotted plastic baggie, and various other sandwich baggies at various other locations in the apartment. Detective North requested that a summons be issued against Mr. Preston for possession of drug paraphernalia. The summons was issued and Mr. Preston was charged with possession of drug paraphernalia.

Mr. Preston has filed a motion requesting that the seized drug paraphernalia be suppressed because the search warrant was invalid. A hearing was scheduled on this matter; the hearing ultimately occurred on December 11, 2006. Mr. Preston was not present at this hearing, but the Court entered an order directing counsel to file letter-briefs outlining their positions on the issue of whether the affidavit of probable cause was adequate. Counsel filed letter-briefs and the Court has considered them.

Legal Analysis

Mr. Preston argues generally that there was insufficient evidence to support the magistrate's finding of probable cause to issue the search warrant.

Both the Fourth Amendment to the United States Constitution and Section 8, Article 1 of the Pennsylvania Constitution require that probable cause exist prior to issuance of a search warrant. The Commonwealth has the burden of proving, by a preponderance of the evidence, that the evidence was obtained in compliance with both the Pennsylvania and United States Constitutions. Commonwealth v. Eliff, 446 A.2d 927, 292 (Pa. Super. 1982).

This Court must examine the affidavit of probable cause and the resulting search warrant based upon the "totality of the circumstances." While evaluating the search warrant, this Court must use evidence within the affidavit of probable cause itself, that is, from the "four corners" of the document. The Court may not use extrinsic evidence. This Court must test the affidavit with "common sense and a realistic manner, and not [subject the affidavit] to overly technical interpretations." To be a constitutionally valid warrant, the events described in the affidavit of probable cause must have occurred close to the date that the warrant was issued. This Court must afford the magistrate "great deference" when reviewing the affidavit of probable cause. Commonwealth v. Sharp, 683 A.2d 1219, 1223 (Pa. Super. 1996).

Mr. Preston first argues that there was never any allegation that he actually resided at the residence. While the affidavit of probable cause does request permission to search Mr. Preston (and anyone else who happens to be present when the search warrant is executed), Mr. Preston was not present for the search and was not searched pursuant to the search warrant. The Court therefore does not consider whether that portion of the search warrant was valid.

Mr. Preston next argues that the affidavit of probable cause does not indicate, specifically, which apartment the drug transactions took place in. However, the affidavit does indicate that Apartment 1 is the apartment to be searched in the final paragraph of the affidavit. The Commonwealth argues that this is a technicality, and that this Court should not consider this technicality when evaluating the validity of the entire warrant. Specifically, the Commonwealth cites Commonwealth v. Ryerson, 817 A.2d 510 (Pa. Super. 2003), a case where the police officer failed to include the date he saw marijuana on a windowsill in the affidavit of probable cause. The date was provided on the application for the search warrant which was

attached to the affidavit. Id. at 514.

Here, the search warrant indicated that apartment number one was the apartment to be searched, even though it was not indicated as the place that the informant entered.

Mr. Preston does not provide any case law to support his allegation that the search warrant should be declared invalid. This Court was unable to find any Pennsylvania case law that supports Mr. Preston's argument.

The Court was able to find an unreported Ohio case which has similar facts to the case at bar, State v. Barkley, 1990 WL 24911 (Ohio Ct. App. 1990) (unreported). In that case, the detective used a confidential informant to purchase drugs and explained how the confidential informant went into the apartment house, received drugs, and then came out again. The affidavit of probable cause never states that the confidential informant told the detective the specific apartment. At the end of the affidavit, the detective requests a warrant for the specific apartment. The Court found that because it was not permitted to perform a *de novo* hearing, it would uphold the finding of probable cause. Id.

In People v. Chandler, 153 Misc.2d 332 (N.Y. Sup. Ct. 1991), a New York trial judge refused to suppress evidence seized as a result of a search warrant where the police had inadvertently omitted the apartment number of the defendant. In that case, it was evident, however, that the police officer knew which apartment was to be searched, as the officer had been inside the apartment and observed contraband. Id. at 336-7. The trial judge quoted a New York Court of Appeals case, which stated that "search warrant applications should not be read in a hypertechnical manner as if they were entries in an essay contest." People v. Hanlon, 330 N.E.2d 631 (N.Y. 1975). The trial judge's ruling was affirmed on appeal to the Appellate Division. People v. Chandler, 212 A.D.2d 623 (N.Y. 2d Dep't 1995)

As this Court must afford "great deference" to a decision made by a magistrate with regard to a determination of probable cause to issue a search warrant, this Court finds that the failure to include the apartment number is not a fatal defect in the affidavit of probable cause.

The Court does wish to make clear, however, that, in general, it is helpful to both the magistrate and the reviewing court for the police officer to indicate how he or she obtained the apartment number that he or she wishes to search. Had this Court received the police officer's affidavit of probable cause, this Court likely would have asked Detective North how he determined the apartment number.

Third, Mr. Preston argues that the confidential informant was unreliable and could not provide probable cause for the search warrant. Whether confidential informants can provide probable cause is governed by Commonwealth v. Luy, 735 A.2d 87 (Pa. 1999). One must evaluate information provided by an informant in a "common sense [and] non-technical manner." Id. at 90. If police "independently corroborate the informant's tip," that can constitute probable cause. Id.

On February 10, 2006, prior to beginning the controlled buy that occurred that day, Detective North searched the confidential informant and determined that he did not have any contraband. The confidential informant went into the house with money. He then returned with a bag of marijuana. Circumstantial evidence indicates that a drug transaction took place inside that apartment - the informant exchanged money for marijuana.

In the incident on March 23, 2006, the informant was again searched prior to beginning the controlled buy. Trooper Snyder determined that he did not have any contraband on him. The confidential informant went into the house with money and returned with a bag of marijuana. Again, circumstantial evidence indicates that a drug transaction took place.

The informant's actions thus were corroborated and constituted sufficient probable cause for the issuance of the search warrant.

Mr. Preston next argues that the information obtained as a result of these various drug transactions is stale. He argues that because the information obtained from the incident which occurred within forty-eight hours of March 20, 2006, was not reported in the affidavit until March 25, 2006, the information could have been nearly seven days old. As discussed *infra* in Footnote 2, the Court believes that the affidavit was dated March 23, 2006, not March 25, 2006, as argued by Mr. Preston. He also argues that since the first transaction occurred within forty-eight hours of February 10, 2006, the information obtained from that transaction is stale.

The Court will consider the staleness of the information in the affidavit of probable cause based upon the dates as indicated in the affidavit of probable cause. Utilizing those dates, it is possible that the information obtained from the March controlled buy was five days old. The Court will consider Mr. Preston's argument that the evidence was stale and assume, for purposes of Mr. Preston's argument, that the

evidence was five days old when the affidavit of probable cause was filed.

A magistrate, in determining whether to issue a search warrant, must determine whether there was a "fair probability" that drugs would exist at the location that the police propose to search. This determination is based on the "totality of the circumstances." This Court, in turn, must determine whether the magistrate had a substantial basis for this determination. Commonwealth v. Klinedinst, 589 A.2d 1119, 1121-22 (Pa. Super. 1991) (citing Illinois v. Gates, 462 U.S. 213 (1983), among other cases)

The Court does not believe that the delay in seeking the search warrant made the evidence stale.

It was evident, based upon the successful controlled buy conducted by the confidential informant, that it was possible to purchase drugs at 161 S. Fourth Street, Apt. 1, within forty-eight hours of March 20, 2006. There is a fair probability that on March 23, 2006 there would be contraband relating to this drug transaction at the purchase location. When bolstered by the evidence that drugs were purchased on February 10, 2006, the probability that drugs would be available at this location increases. This probability constituted sufficient probable cause to support the issuance of a search warrant.

Mr. Preston also argues that the controlled buy conducted on February 10, 2006 was too stale to support the issuance of a search warrant. If this evidence was the only evidence that supported the issuance of the warrant on March 23, 2006, this Court might have found that the information was too stale to support the issuance of the warrant. However, because the evidence was used in conjunction with a more recent drug sale, the Court does not believe that the alleged staleness of this evidence affects the overall validity of the search warrant.

Mr. Preston also argues that because no evidence of drug dealing was found after the search, the warrant should not have been issued. Even if this is the case, that fact is not relevant to the propriety of the issuance of the search warrant because it is extrinsic evidence not contained within the four corners of the affidavit of probable cause. There is no allegation by Mr. Preston that the police exceeded the scope of the search warrant. The police were authorized to search the apartment and discovered items that could be considered drug paraphernalia. Whether the police found what they anticipated to find is not relevant to whether the affidavit of probable cause was sufficient to permit issuance of the search warrant.

As discussed above, the Court believes that there was ample evidence to support the issuance of the search warrant. The Commonwealth has carried its burden under the United States and Pennsylvania constitutions and proved, by a preponderance of the evidence, that the items were seized lawfully. The Court therefore will deny Mr. Preston's Motion to Suppress Evidence Seized in Execution of Search Warrant Issued on Insufficient Evidence.

ORDER OF COURT

And now this 12th day of January, 2007, the Court orders that Defendant's Motion to Suppress Evidence Seized in Execution of Search Warrant Issued on Insufficient Evidence is denied.

[1] The Affidavit of Probable Cause does not list Trooper Snyder's last name.

[2] The Court notes that Mr. Preston states in his letter brief that the affidavit was dated March 25, 2006. The Court, after review of the affidavit of probable cause, believes that the affidavit was dated March 23, 2006. The search warrant was issued on March 23, 2006, the same day as the affidavit.