

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
FEBRUARY SESSION, 1996

FILED

June 28, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellant

vs.

BARBARA COPELAND,

Appellee

No. 03C01-9402-CR-00079

COCKE COUNTY

Hon. BEN W. HOOPER II, Judge

(State Appeal - Suppression of Search
Warrant)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

This is an appeal by the State of Tennessee pursuant to Rule 3(c) of the Tennessee Rules of Appellate Procedure. On November 29, 1993, the appellee, Barbara Copeland, filed a motion to suppress all evidence seized pursuant to a search warrant issued and executed for her residence on December 12, 1992. The Cocke County Circuit Court found that the search warrant was fatally defective because the allegations in the affidavit were insufficient to justify the issuance of the warrant. Accordingly, the trial court granted the motion to suppress. The State appeals the order of the trial court suppressing the evidence seized from the appellee's residence. After a review of the record and the applicable law, we affirm the judgment of the trial court.

I. Factual Background

On December 9, 1992, Blaine Hartsell, Chief Deputy of the Cocke County Sheriff's Office, obtained a search warrant for the appellee's residence. The affidavit for the search warrant recited the following facts:

On December 8, 1992, a reliable and confidential source of information told me that source had been on above described premises when marijuana, cocaine, and other types of drugs were purchased, this all occurred within the previous 72 hours. The reliable confidential source has given affiant good and reliable information in the past which has led to the seizure of illegal drugs. The reliable and confidential source is a citizen of Cocke County. The reliable and confidential source is known to affiant and other offices [sic] as being a truthful person in Cocke County. The above deft [sic] is known to several law enforcement offices [sic] as to be involved in drug trafficking [sic]. This occurred in Cocke County.

Deputies with the Cocke County Sheriff's Office executed the warrant that same

day. The officers recovered cocaine, cash, and other items from the appellee's residence.

On November 29, 1993, the trial court held a hearing on the appellee's motion to suppress the evidence recovered in the search. At the hearing, Chief Deputy Hartsell testified that, approximately one week prior to the issuance of the search warrant in this case, he arrested Beth Gregg for theft of property. At this time, Gregg indicated that she did not want to go to jail and agreed to provide information to the sheriff's department. Gregg had supplied information to the sheriff's department on two previous occasions. Approximately two days before the issuance of the search warrant, Gregg came to the sheriff's office and provided Hartsell with the information used to obtain the search warrant. Hartsell testified that, during this meeting, Gregg informed him that she had been to the appellee's house on December 7. She then gave him directions to the appellee's residence. Hartsell admitted that Gregg did not describe the appellee nor did she identify the appellee by any name other than "Big Barb." He stated that Gregg told him that "she had seen the drugs -- that she had been there when marijuana and cocaine, and other types of drugs were purchased." However, Hartsell conceded that he never asked Gregg if she had seen the appellee in possession of drugs.

Gregg also testified at the hearing. She testified that she had spoken with Deputy Hartsell about providing information that could lead to arrests. Specifically, on December 8, Hartsell asked the informant to reveal her source of crack cocaine. Gregg testified that, when she refused to provide the information, the deputies "threatened her with jail and put her under pressure." Ultimately, the deputies offered her "help" with her own criminal charges if she assisted them.

To keep herself out of jail, Gregg informed Hartsell that a William Sisk had told her that he was "getting stuff from somebody named Barbara." She added that one night she and Sisk were driving toward Carson Springs when he told her to get on the floorboard. Gregg complied, and Sisk stopped his truck at a house. Sisk went into the house alone. Shortly thereafter, he returned to the truck. When they returned to the road, Sisk told Gregg "I got something" and pulled out an eight ball of cocaine. Sisk informed Gregg that he got the cocaine from "Barb."

Gregg testified that she did not know "Barb," did not go into the house, could not describe the house, and could not give directions to the appellee's house. She added that she had never told Hartsell that she had seen the house. Furthermore, she testified that the transaction involving Sisk occurred more than a week prior to her conversation with Hartsell. Finally, Gregg asserted that she had no personal knowledge of whether Sisk received "drugs" from the appellee.

After taking the motion under advisement, the trial court granted the appellee's motion to suppress finding that the affidavit supporting the search warrant was insufficient. Specifically, the trial court found that the affidavit failed to meet the "basis of knowledge" prong of the Aguilar-Spinelli test because the informant had no personal knowledge of the drug transaction.

II. Appellate Procedure

Initially, the appellee contends that this issue is not properly before this

court.¹ The State brings this appeal pursuant to Tenn. R. App. P. 3(c). Rule 3(c) provides only the following circumstances in which the State may appeal as of right in criminal actions:

In criminal actions an appeal as of right by the state lies only from an order or judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) the substantive effect of which results in dismissing an indictment, information, or complaint; (2) setting aside a verdict of guilty and entering a judgment of acquittal; (3) arresting judgment; (4) granting or refusing to revoke probation; or (5) remanding a child to the juvenile court. The state may also appeal as of right from a final judgment in a habeas corpus, extradition, or post-conviction proceeding.

The appellee asserts that the record does not support any of these conditions. Specifically, the appellee argues that the record does not indicate that the court's order granting suppression would result in a dismissal of the presentment in this case. Moreover, the appellee maintains that the State could only have brought the appeal under Tenn. R. App. P. 9 or 10 and even that procedure is questionable. We disagree.

We conclude that the State's appeal is proper under Tenn. R. App. P. 3(c) because the trial court's order has the substantive effect of dismissing the indictment. We would agree that the record could have reflected with greater clarity the order's implications. However, "Rule 3(c) does not require the entry of an order of dismissal as a precondition to a State's appeal." State v. Udzinski, No. 01C01-9212-CC-00380 (Tenn. Crim. App. at Nashville, Nov. 18, 1993). Although we are cognizant of the fact that a suppression order does not always have the effect of a dismissal, in the present case we have no difficulty in concluding that the suppression of the evidence effectively results in the dismissal of the indictment. Thus, we conclude that the State is properly before

¹We note that the State has not responded to the appellee's allegation regarding appellate procedure.

this court pursuant to Tenn. R. App. P. 3(c).² See, e.g., State v. Brown, 898 S.W.2d 749, 750 (Tenn. Crim. App. 1994); State v. Lee, No. 01C01-9406-CC-00211 (Tenn. Crim. App. at Nashville, June 28, 1995); Udzinski, No. 01C01-9212-CC-00380.

III. Sufficiency of the Affidavit

We now address the final and dispositive issue in this case. That is, whether the affidavit was sufficient to support the issuance of the search warrant. As stated previously, the trial court ruled that the affidavit underlying the search warrant was insufficient. Specifically, the court found that the affidavit fails to meet the "basis of knowledge" prong of the Aguilar-Spinelli test. The State contests this finding. We agree with the findings of the trial court and affirm its judgment.

An affidavit is an indispensable prerequisite to the issuance of any search warrant. Tenn. Code Ann. § 40-6-103 (1990). Before a search warrant may issue, an affidavit must set forth, on its face, facts that establish probable cause. Tenn. Code Ann. § 40-6-104 (1990). Probable cause has generally been defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act. Tenn. Code Ann. § 40-6-104; State v. Johnson, 854 S.W.2d 897, 899 (Tenn. Crim. App. 1993). Probable cause to support the issuance of a warrant must appear in the affidavit, and judicial review of the existence of probable cause will not include looking to other evidence provided to

²We note that, even if her argument had merit, our "supreme court has held that it has the authority to transform an appeal improperly filed under Rule 3 into a proper appeal under Rule 10. State v. Gallaher, 730 S.W.2d 622, 623 (Tenn. 1987). We have the same power over appeals filed in this Court." State v. Smythe, No. 01C01-9102-CR-00046 (Tenn. Crim. App. at Nashville, Nov. 2, 1992).

or known by the issuing magistrate or possessed by the affiant. State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992).

When the affidavit in the warrant is based upon information supplied by a confidential source, the adequacy of the affidavit is measured by a two-pronged test:

- (1) whether the affidavit contains the basis of the informant's knowledge; and
- (2) whether the affidavit includes a factual allegation that the informant is credible or the information is reliable.

State v. Jacumin, 778 S.W.2d 430, 432-36 (Tenn. 1989) (rejecting the "totality of circumstances" test set forth in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983), and adopting the two-prong test developed in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969)). This test is commonly referred to as the Aguilar-Spinelli test.

To satisfy the "basis of knowledge" prong of the Aguilar-Spinelli test, a warrant, which relies on information supplied by a confidential informant, must describe facts that permit the magistrate to determine whether the informant had a basis for his information that a certain person had been, was, or would be involved in criminal activity or that evidence of a crime would be found at a certain place. State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992). In the context of a probable cause analysis, the Supreme Court in Spinelli held that:

[i]n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

393 U.S. at 416, 89 S.Ct. at 589. Additionally, Tennessee case law makes it clear that, to establish probable cause, the informant must describe the manner in which he gathered the information, or the informant must describe the criminal

activity of the suspects with great detail. See, e.g., Earls v. State, 496 S.W.2d 464 (Tenn. 1973); State v. Smith, 477 S.W.2d 6 (Tenn. 1972); State v. Vela, 645 S.W.2d 765 (Tenn. Crim. App. 1982). In the present case, the affidavit fails to identify any illegal activity by the appellee and, in fact, makes no reference to the appellee whatsoever. Moreover, the affidavit fails to establish whether the informant personally observed the criminal activity. Rather, the affidavit simply states that drugs were purchased. Accordingly, the affidavit does not satisfy the "basis of knowledge" prong.

Under the veracity prong, facts must be revealed which permit the magistrate to determine either the inherent credibility of the informant or the reliability of his information on the particular occasion. Moon, 841 S.W.2d at 338. Although now moot, we conclude that the affidavit satisfies the second prong of the Aguilar-Spinelli test because the affiant indicated that the source's prior information had led to the "seizure of illegal drugs." See State v. Henry, 680 S.W.2d 476, 478 (Tenn. Crim. App. 1984); State v. Scarlett, No. 03C01-9409-CR-00315 (Tenn. Crim. App. at Knoxville, Oct. 13, 1995); Udzinski, No. 01C01-9212-CC-00380.

Thus, we conclude that, although the affidavit satisfies the veracity prong of the Aguilar-Spinelli test, it fails the "basis of knowledge" test. In essence, the affidavit states that the confidential informant was on the premises when marijuana and cocaine were purchased. However, the affidavit fails to establish that the affiant had personal knowledge of the facts or had personally observed anything recited in the affidavit. Accordingly, probable cause cannot be established under the Aguilar-Spinelli test. Thus, the affidavit is not sufficient to support the issuance of a search warrant. The judgment of the trial court is affirmed.

DAVID G. HAYES, Judge

CONCUR:

JOHN H. PEAY, Judge

WILLIAM M. BARKER, Judge