

OPINION

The State has appealed, as of right pursuant to Rule 3(c) of the Rules of Appellate Procedure, from an order of the Wilson County Criminal Court, dismissing an indictment at the conclusion of a suppression of evidence hearing. The Wilson County Grand Jury returned a three count indictment against the defendant, Edward D. Coffee, for the unlawful possession of one half ounce or more of marijuana with intent to sell, for the unlawful possession of less than one half gram of cocaine with the intent to sell, and the unlawful and knowing possession of drug paraphernalia, to wit a crack pipe, all occurring on December 6, 1997.

The State presents one appellate issue:

Whether the trial court erred in suppressing evidence seized pursuant to a lawfully issued search warrant and dismissing the indictment against the defendant?

After a review of the entire record, briefs of the parties and applicable law, we AFFIRM the trial court's judgment.

SEARCH WARRANT

The search warrant was executed by Steven N. Lowery, a Lebanon City Police Officer, on December 6, 1997. Law enforcement officers seized one baggie containing cocaine powder, one gold jewelry box, several baggies containing a schedule VI controlled substance (marijuana), \$125.00 in food stamps, one crack pipe, \$2,423.00 in U.S. currency, a tin can containing a schedule VI controlled substance, and one Advil bottle containing blue pills from the defendant's residence.

The pertinent part of the affidavit is set out as follows:

On December 5, 1997, your affiant received information from a confidential informant introduced to Detective Lowery by Detective King of Mt. Juliet Police Department. The informant advised that he had in the past purchased schedule VI from Dayle Coffee at 1008 Center Street. The CI further advised that it had in the past cost \$70.00 of U.S. currency for a quarter ounce of schedule VI. To corroborate this information, the CI was wired with a listening/monitoring device and issued \$70.00 of U.S. currency of which the serial numbers had been copied. The CI then proceeded to 1008 Center Street where he purchased \$70.00 worth of schedule VI. This transaction was monitored by Detectives Lowery and Nokes. By past experience and training, I, Detective Lowery believe that the \$70.00 of marked U.S. currency, records of narcotic sales, schedule VI and paraphernalia will be found at 1008 Center Street, Lebanon.

The search warrant was issued by James R. Hankins, Wilson County Judicial

Magistrate on December 5, 1997, at 12:42 p.m. to Steven N. Lowery, Lebanon Police Department.

The defendant filed a motion to suppress the evidence alleging that the articles seized from his residence were done so in violation of Tennessee Rules of Criminal Procedure 41(c), Tenn. Code Ann. § 40-6-104, the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 7, 8, and 9 of the Tennessee Constitution. The defendant set out thirteen (13) grounds as to why the search warrant was faulty. More specifically in ground 12(f), the defendant alleges that the Judicial Commissioner issuing the warrant failed to keep an exact copy of the original of said search warrant as part of his official records.

At the evidentiary hearing, which consisted of arguments of counsel, the State conceded that the judicial commissioner failed to keep an exact copy of the search warrant as required by Rule 41(c) of the Tennessee Rules of Criminal Procedure. The trial court granted the defendant's request for an order suppressing the evidence seized at this residence and dismissed the indictment.

LEGAL ANALYSIS

The State asserts that the trial court erred in dismissing the indictment in that the defendant failed to establish prejudice by the issuing magistrate's failure to perform a ministerial duty. The defendant contends that the trial court was correct in its ruling.

The standard of appellate review regarding the issue of suppression of evidence is as follows:

The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld.

State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996).

Tenn. R. Crim. P. 41(c) provides in pertinent part:

The search warrant shall command the peace officer to search forthwith the person or place named for the property specified. *The magistrate shall prepare an original and two exact copies of the search warrant, one of which shall be kept by the magistrate as a part of his or her official records, and one of which shall be left with person or persons on whom the search warrant is served. The magistrate shall endorse upon the search warrant the hour, date, and name of the officer to whom the warrant was delivered for*

execution; and the exact copy of the search warrant and the endorsement thereon shall be admissible evidence. Failure of the magistrate to make said original and two copies of the search warrant or failure to endorse thereon the date and time of issuance and the name of the officer to whom issued, or the failure of the serving officer where possible to leave a copy with the person or persons on whom the search warrant is being served, shall make any search conducted under said search warrant an illegal search and any seizure thereunder an illegal seizure. (emphasis added).

The State asserts that the court erred in dismissing the indictment against the defendant on the grounds that the defendant failed to raise a question concerning the authenticity of the original warrant nor alleged prejudice, citing *State v. Gambrel*, 783 S.W.2d 191 (Tenn. Crim. App.) *per app. denied*, (Tenn. 1990); *State v. Henry*, 680 S.W.2d 476, 478-79 (Tenn. Crim. App.) *per app. denied*, (Tenn. 1984); and *State v. Stockton*, No. 288, 1989 WL 3186, (Tenn. Crim. App.), *per app. denied*, (Tenn. 1989).

In reviewing *Gambrel* and *Henry*, we find these cases are distinguishable from the facts in this case. Although retention of an exact copy of a search warrant was at issue in *Gambrel* and *Henry*, this Court held that the magistrate had complied with the requirements of Rule 41(c). In *Gambrel*, the magistrate's copy of the search warrant was very dim, but the magistrate had retained a copy of the search warrant. Likewise, the defendant had failed to raise any questions as to the authenticity of the search warrant, nor any prejudice. In *Henry*, this Court determined that all the requirements of Rule 41(c) were met by the magistrate, but the magistrate had lost its copy of the search warrant. Likewise, the defendant failed to establish that he had been prejudiced by the missing copy, or that the original warrant was altered, or that there was any misconduct on the part of any one related to the warrant.

In *State v. Brewer*, 989 S.W.2d 349 (Tenn. Crim. App. 1997), this Court addressed the issue of a magistrate's failure to retain an exact copy of a search warrant. In that case, Detective Roxanne Blackwell from the Bradley County Sheriff's Department testified that, upon issuance of the search warrant to her, she kept all three copies. She testified that the usual procedure was for the executing officer to take all three copies of the warrants, and, after execution, to take them to the office in order to add the listing of evidence seized. This Court held that the failure of the magistrate to retain a copy of the search warrant deprived the warrant of any efficacy, and, thus, the search of the Brewer's

residence was invalid. In the present case, the evidentiary hearing consisted of legal arguments, and there was no testimony as to how and why the magistrate failed to retain an exact copy of the search warrant, so we can only speculate as to what happened.

We find this Court's language in *Brewer* dispositive of this issue:

On the other hand, one of the express mandatory directives of the rule is that the magistrate *make* an original and two copies of the warrant. The rule is clear that the purpose of one of these copies is that it remain in the possession of the magistrate "as part of his or her official records." Thus, the object of the making of a magistrate's copy is that the magistrate have and keep the copy after issuance of the warrant. For this reason, we conclude that the magistrate's retention of a copy of the search warrant is implicit in the mandatory provisions of Rule 41(c), the provisions under which a failure to comply "shall make any search conducted..... an illegal search and any seizure thereunder an illegal seizure." Tenn. Crim. P. 989 S.W.2d at 355.

Although, we find merit in the State's argument that a factual situation, such as we have in this case, should require the defendant to show some prejudice or showing as to the authenticity of the search warrant, we hold that the language of Rule 41(c) is clear as to its intent.

The judgment of the trial court is affirmed.

L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

JOE G. RILEY, JUDGE

THOMAS T. WOODALL, JUDGE