IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9505-CC-00123
Appellee,	*	GIBSON COUNTY
VS.	*	Hon. Dick Jerman, Jr., Judge
FREDDIE LEON CHISM,	*	(Certified Question of Law)
Appellant.	*	

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OPINION FILED _____

REVERSED AND REMANDED

GARY R. WADE, JUDGE

OPINION

The defendant, Freddie Leon Chism, pled guilty to possession of cocaine with intent to deliver or sell and possession of drug paraphernalia; he reserved the right to appeal as a certified question of law the denial of his motion to suppress. See Tenn. R. Crim. P. 11(e) and 37(b)(2). The trial court imposed Range I concurrent sentences of three years for the possession with intent to deliver or sell cocaine and eleven months and twenty-nine days for the possession of drug paraphernalia.

In this appeal, the defendant contends that the affidavit in support of the search warrant was inadequate (1) by failing to establish the reliability of the informant and (2) by failing to establish probable cause. Because the affidavit upon which the search warrant was based is inadequate, we must reverse the convictions, suppress the evidence acquired in the search, and remand this action to the trial court for any further proceedings.

On June 16, 1994, a warrant was issued for the search of the defendant's residence in Gibson County. When the police executed the search warrant, they found plastic baggies with cocaine residue, a flask containing freshly made cocaine, twenty-five dollars in cash, and a plate and pan suitable for cooking and cutting cocaine. The supporting affidavit provided as follows:

> [A]ffiant has a confidential and reliable informant who has furnished information that has proven to be truthful that Ronnie Lynn Johnson delivers powdered cocaine to

> Freddie Chism at the above aforementioned address on a continuous and regular basis, and that Ronnie has Freddie Chism manufacture cocaine into crack for sales. The informant has personally observed this in the past on more than 1-occassion. Furthermore officers doing surveillance on Chism's residence corraborated this by observing Johnson and other known drug dealers frequenting Chism's residence in the past 5-days.... Ronnie Johnson, Jeff Young, and Ronnie Germaine Young are known in the community to be cocaine dealers.

I

Initially, an affidavit is an indispensable prerequisite to the issuance of any search warrant. Tenn. Code Ann. § 40-6-103; State ex rel. Blackburn v. Fox, 200 Tenn. 227, 230, 292 S.W.2d 21, 23 (1956). It must establish probable cause. Tenn. Code Ann. § 40-6-104; Tenn. R. Crim. P. 41(c). Probable cause has been generally defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act. See Lea v. State, 181 Tenn. 378, 380-81, 181 S.W.2d 351, 352 (1944).

Also, fundamental to the issuance of a search warrant is the requirement that the issuing magistrate make an independent determination that probable cause exists. See State v. Moon, 841 S.W.2d 336, 337 (Tenn. Crim. App. 1992). Because the magistrate must make an independent determination, it is imperative that the affidavit contain more than conclusory allegations. "'Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police.'" State v. Moon, 841 S.W.2d at 338 (quoting United States v. Ventresca, 380 U.S. 102, 108-09

(1965)).

We will first consider the defendant's argument that the affidavit fails to establish the informant's reliability. The general rule is that if the information in the affidavit is supplied by a confidential informant, the adequacy of the affidavit is measured by a two-pronged test:

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

State v. Jacumin, 778 S.W.2d 430, 432, 436 (Tenn. 1989)(relying upon Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969)).

In Aguilar, the United States Supreme Court held that a search warrant was improvidently issued by the magistrate because the affidavit did not contain any underlying circumstances indicative of illegal activity or any facts disclosing the credibility of the informant or the reliability of the information given. 378 U.S. at 114. Although the United States Supreme Court no longer employs the Aguilar-Spinelli test, our supreme court has determined that the test, "if not applied hypertechnically, provide[s] a more appropriate structure for probable cause inquiries incident to the issuance of a search warrant ... [and] is more in keeping with the specific requirement of Article I, Section 7 of the Tennessee Constitution ...." State v. Jacumin, 778 S.W.2d at 436.

A conclusory allegation of the informant's reliability is insufficient to satisfy the veracity prong. Spinelli v. United States, 393 U.S. at 416. "It disallows any evaluation by the magistrate and requires that the magistrate accept the affiant's conclusions not only that the prior information was credible but also that it was relevant and indicative of reliability. By its nature, such an allegation voids the magisterial function." State v. Stephen Udzinski, Jr., No. 01C01-9212-CC-00380, slip op. at 8 (Tenn. Crim. App., at Nashville, Nov. 18, 1993). Thus, the affidavit must include the specific underlying circumstances which establish the reliability of the confidential informant.

In State v. Moon, this court found an affidavit to be inadequate when the informant, who claimed to have seen marijuana on the premises to be searched, was described only as a "reliable" person who "'has given information against his penal [interest] and ... has given information that affiant has checked and found to be correct.'" 841 S.W.2d at 339. Similarly, in the consolidated case of State v. Landon Gaw & State v. Ronald Wayne Nail, No. 01C01-9410-CC-00351, slip op. at 6-7 (Tenn. Crim. App., at Nashville, Oct. 26, 1995), this court held an affidavit which merely stated that the "informant has provided accurate and reliable information in the past to Officer Winfree" failed to establish the veracity of the informant.

The affidavit here is similar to the affidavits in

Moon and Gaw. It contains nothing more than a conclusory allegation of the informant's veracity: "confidential and reliable informant who has furnished information that has proven to be truthful ...." In our view, that allegation fails to adequately establish the veracity of the informant under the guidelines first established in Aguilar and Spinelli. The kind, quality, and nature of the information previously given by the informant was not provided to the issuing magistrate. Thus the magistrate had to rely entirely upon the affiant's assertion that the informant was reliable.

The failure to establish the veracity of the confidential informant, however, is not necessarily fatal to the affidavit. The ruling in Jacumin provides that "independent police corroboration could make up deficiencies in either prong" of the Aguilar-Spinelli test. State v. Jacumin, 778 S.W.2d at 436; see Spinelli v. United States, 303 U.S. at 414-15. Thus we must consider whether the police corroboration alleged in this affidavit is sufficient to satisfy the veracity prong of Jacumin.

This court first addressed the issue of how much police corroboration is needed to support a determination of reliability of information in Moon. The question was framed as follows: "'Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration?'" State v. Moon, 841 S.W.2d at 340 (quoting Spinelli v. United States, 393 U.S. at

414-15). In Moon, the court found the affidavit to be inadequate due to a conclusory allegation of corroboration, unaccompanied by any underlying facts:

> ["]Certainly, more than the corroboration of a few minor elements of the story is necessary, especially if those elements involve non-suspect behavior. It is equally certain, though, that the police need not corroborate every detail of an informant's report to establish sufficient evidence of his veracity." ... [I]t is not necessary that the events observed by the police supply probable cause by themselves or that they point unequivocally in the direction of guilt. It is sufficient that they are 'unusual and inviting explanation,' though 'as consistent with innocent as with criminal activity.' Thus, when an untested informant says that he has seen horse race bets taken at a steel plant and then passed through the fence to defendant, police observation of packages being passed to the defendant on several occasions 'was sufficient to establish the relibility of the informer in this instance.' Similarly, where an informer said narcotics were being sold in a certain record shop and that he had purchased narcotics and seen others there, this was adequately corroborated by a half hour surveillance of the shop resulting in 'personal observation of known narcotic addicts entering the premises, speaking with a clerk, going to the rear of the store and then exiting with no apparent purchase.'["]

State v. Moon, 841 S.W.2d at 341 (emphasis added)(quoting United States v. Bush, 647 F.2d 357, 363 (3rd Cir. 1981) and 1 Wayne R. LaFave, Search and Seizure § 3.3(f), at 683 (2d ed. 1978)).

In State v. Marshall, 870 S.W.2d 532 (Tenn. Crim. App. 1993), this court reviewed a warrantless arrest where probable cause was based on an anonymous informant's tip and police corroboration. The defendant argued the arrest was

illegal because the officer did not have a basis for determining the reliability of the informant. By use of the standard in Moon, we found the presence of probable cause. Although the police officer did not have a basis for determining the informant's reliability, the corroboration was substantial. The police officer saw cash change hands and observed the defendant "approaching cars, leaning inside windows, and going back and forth from his shirt and pants pockets while leaning into the cars." State v. Marshall, 870 S.W.2d at 536.

Here, the affidavit contains something more than a conclusory allegation of police corroboration; police had seen "other known drug dealers frequenting Chism's residence in the past [five] days." The degree of corrobation, however, falls far short of that in Marshall. The characterization "known drug dealers" is just as conclusory as the bare assertion that the informant was reliable. At best, the observations by the officers corroborated "minor elements of the story," that is, that persons who were commonly known as drug dealers had visited the residence. See State v. Moon, 841 S.W.2d at 341.

Traditionally, the "inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." Sibron v. New York, 392 U.S. 40, 62 (1968). Similarly, in Spinelli, the affidavit alleged the defendant was an "associate of [known] bookmakers ... and

[known] gamblers." 393 U.S. at 414. The United States Supreme Court characterized that allegation as a "bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." Id.

It would be difficult indeed to distinguish the allegations here from those in Spinelli. In each case, the magistrate was asked to infer illegal activity by the association with "known" violators. Because the ruling in Spinelli was the basis for our supreme court's holding in Jacumin, we are bound to apply its rationale to this case.

In order to meet state constitutional standards, a search warrant's affidavit must allege facts which are "inviting of explanation" by the suspect. State v. Moon, 841 S.W.2d at 341. For example, if the affiant alleged that the police had observed Johnson carrying small packages into or away from Chism's residence, this might have supported an inference that Johnson was either delivering or receiving cocaine. If the affidavit contained allegations that the drug dealers made brief visits to Chism's house, that might have supported an inference that they were there for business rather than personal reasons, such as the purchase or delivery of illegal drugs. In the context of prior case law, however, the bare allegation that Chism had been visited by Johnson and other known drug dealers, without more, had insufficient probative value.

Some earlier Tennessee cases may have implied that

the observation of a defendant associating with known drug dealers or users is adequate corroboration of an allegation that the defendant is involved in illicit drug activity. See, e.g., State v. Jacumin, 778 S.W.2d at 437; State v. Billy Jerome McMillin & Donna Day McMillin, No. 03C01-9110-CR-00322, slip op. at 4 (Tenn. Crim. App., at Knoxville, September 18, 1992). These cases, however, should not be read as holding that the mere observation of the defendant associating with known drug dealers or users is sufficient to establish probable cause. In Jacumin, the fact that one vehicle registered to a known drug dealer and a second vehicle, believed to have been driven by someone suspected of being involved in illegal drugs, had been seen at the defendant's house was inadequate to satisfy the basis of knowledge prong. 778 S.W.2d at 436. In the McMillin case, this court held that police who observed the defendant being visited by several known addicts "marginally satisfied the veracity prong," where each of the visits lasted for no longer than fifteen minutes. State v. McMillin, supra, slip op. at 3.

The examples of adequate police corroboration given in Moon involve more than mere association with other persons known to be breaking the law. In the example involving illegal drugs, the police observed several known narcotic addicts behaving in a manner suggestive of illegal drug sales. The documented police corroboration in this case did not reach that level.

II

The defendant also challenges the probable cause requirement of the affidavit because it failed to state the date or time when the informant saw the illegal activity. In State v. Baker, 625 S.W.2d 724, 726 (Tenn. Crim. App. 1981), this court held as follows:

> [T]he absence of a specific date in the affidavit setting out when the illegal activity was observed is not required if the affidavit sets out sufficient facts from which the magistrate issuing the warrant could find probable cause to believe the illegal activity, or other matters justifying a search, are occurring or are present on the premises when the search warrant is issued.

This court also stated that "there must be something set out in the affidvit which would give probable cause to believe the illegal activity was continuing at the time the search warrant was issued." State v. Baker, 625 S.W.2d at 626 (discussing the holding in Welchance v. State, 173 Tenn. 26, 114 S.W.2d 781 (1938)). The date requirement is not a "literal" one, as long as the issuing magistrate can find there is probable cause to believe there is illegal activity occurring on the premises at the time the warrant is issued. See State v. McCormick, 584 S.W.2d 821, 824 (Tenn. Crim. App. 1979).

The state argues that since the illegal activity was described as occurring on a "continuous and regular basis," the magistrate could have found probable cause that the activity was occurring at the time the search warrant was issued. The opinion in Baker, however, establishes that an affidavit which describes the activity in the present tense may be void under some circumstances. State v. Baker, 625

S.W.2d at 726. If an event a person saw at some unidentified point in the past is the basis for determining whether the illegal activity is continuous, and if there is nothing in the affidavit to connect the past observation to the time when the search warrant is issued, the affidavit may be void. State v. Baker, 625 S.W.2d at 726.

The holding in Baker controls here. While the activity is described as regular and ongoing, the basis for this allegation is something the informant observed at some unidentifiable time in the past. While the date of the observations is not essential, there must be something in the affidavit "from which the magistrate issuing the warrant could find probable cause to believe the illegal activity ... is occurring ... when the search warrant is issued." State v. Baker, 625 S.W.2d at 726. The only part of this affidavit which could connect it to the time when the search warrant was issued is the police observation of "known drug dealers" frequenting the premises over the past five days prior to the application for the search warrant. As stated, however, the mere presence of drug dealers, without more, does not establish probable cause.

Accordingly, the convictions are reversed and the case remanded to the trial court.

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Gary R. Wade, Judge

CONCUR:

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John H. Peay, Judge

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David H. Welles, Judge