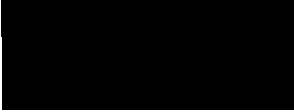


NO.



JEFFERSON CIRCUIT COURT

DIVISION THIRTEEN (13)

JUDGE FREDERIC J. COWEN

COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

MOTION FOR SUPPRESSION HEARING


DEFENDANT

TO: Tom Van De Rostyne
Assistant Commonwealth's Atty
514 West Liberty Street
Louisville, Kentucky 40202


* * * * *

Comes now the Defendant, [Defendant], through undersigned counsel, pursuant to RCr 9.78, Section 10 of the Kentucky Constitution, and the Fourth Amendment to the U.S. Constitution, and moves this Court to grant an evidentiary hearing, and in support of this motion Defendant states as follows:

STATEMENT OF THE ISSUE

Defendant's federal and state constitutional rights were violated when a search warrant for his home and car was issued based on an affidavit that (1) contained intentionally misleading information and (2) failed to describe the things to be seized with the particularity required by the U.S. and Kentucky Constitutions. For these reasons, Defendant asks the Court to grant a hearing regarding the admissibility of evidence seized pursuant to said warrant.

FACTUAL BACKGROUND

Defendant is charged with several counts of burglary and other similar non-violent offenses. On June 4, 2004, Detective  interviewed [Defendant #2] ("D2") at the Jefferson

County Metro Corrections Center at D2's request. D2 was incarcerated and charged with several of the same burglary offenses that Defendant [Defendant] is now charged with, and was thus a co-defendant in those same criminal charges. In exchange for more lenient prosecution by the Commonwealth, D2 agreed to provide information to Detective [Detective] about several burglaries. After the interview, Detective [Detective] prepared an affidavit (*attached as Exhibit 2*) in which he indicated that a "cooperating source" had informed him that "[Defendant] and another" had committed a series of burglaries in Jefferson County. *[Detective] Affidavit, at 2.*

Detective [Detective] omitted from the affidavit the fact that Co-Defendant D2 is both the "cooperating source" and the "another" with whom Defendant is accused of committing the offenses. In his affidavit, Detective [Detective] described the items alleged to have been taken in the burglaries as "handguns, jewelry, longguns [sic], coins, and computer equipment." *Id.* Based on D2's information, Detective [Detective] completed an investigation of Defendant [Defendant] that included observing Defendant enter and exit his home, observing Defendant operate his car, and transporting Co-Defendant D2 to Tennessee so that D2 could identify a coin shop where D2 claimed he and Defendant [Defendant] had sold stolen coins in exchange for a check that was cashed at a nearby bank. *Id. at 3.*

On June 9, 2004, Detective [Detective] submitted his affidavit to Judge Chavin of the Jefferson Circuit Court. Judge Chavin then issued a search warrant for Defendant's home and car (*attached as Exhibit 1*), which Detective [Detective] and other LMPD officers then searched. The officers seized over one hundred (100) items from Defendant's home and car (*see LMPD Seized Property list, attached as Exhibit 3*). Among these one hundred-plus items were approximately eight (8) varied pieces of jewelry in the home and car, two (2) computers and related computer equipment in the home, and no coins or guns.

LEGAL ARGUMENTS

I. THE AFFIDAVIT UPON WHICH THE SEARCH WARRANT WAS ISSUED CONTAINS INTENTIONALLY MISLEADING INFORMATION

A. Legal Standards

For a warrant to issue, an "officer must have an objectively reasonable belief in the sufficiency of the warrant and the probable cause determination." *Crayton v. Commonwealth*, 846 S.W.2d 684, 687 (Ky.1992), citing *United States v. Leon*, 468 U.S. 897 (1984). Where an affidavit contains "misleading information, the officer's reliance cannot be reasonable." *Id.*, at 687-688. "The 'good faith' exception announced in *United States v. Leon*, applicable when police conduct a search under a search warrant later found defective, is unavailable when the affidavit contains false or misleading information." *Commonwealth v. Smith*, 898 S.W.2d 496, 504 (Ky.App. 1995), citing *Crayton* at 687-688.

B. Instances of Misleading Information in Detective [Detective]'s Affidavit

Below, Defendant lists and analyzes the six (6) specific instances of misleading information contained in Detective [Detective]'s affidavit. These individual instances add up to a very misleading whole that constitutes reckless disregard for the truth and precludes the formation of an objectively reasonable belief in the existence of probable cause.

1. "cooperating source" ([Detective] Affidavit, at 2.)

Throughout his affidavit, Detective [Detective] credits an unnamed "cooperating source" ("CS") with providing information about Defendant [Defendant]. This CS was in fact Co-Defendant D2, who (a) has admitted to committing the burglaries of which Defendant [Defendant] now stands accused and (b) provided the information to Detective [Detective] in exchange for more lenient prosecution by the Commonwealth. By choosing to mask the identity of the CS as Co-Defendant D2, Detective [Detective] denied Judge Chavin the opportunity to weigh the credibility

of D2, who had a clear interest in providing information that would point investigators away from him, whether that information was truthful or not.

Further, the affidavit provides no indication that this CS was reliable. In finding probable cause based on an informant's tip, the "totality of the circumstances test requires a balancing of the relative indicia of reliability accompanying an informant's tip." *Lovett v. Commonwealth*, 103 S.W.3d 72, 78 (Ky. 2003). In this case, there is no mention of previously verified tips, presumably because there were none. There is no mention that the CS is incarcerated and had bargained with the Commonwealth in exchange for leniency. There is no mention that the CS had admitted to perpetrating exactly the same burglaries that the Defendant now stands accused of committing. By obscuring these facts, which go directly to the credibility of the informant, Detective [Detective]'s affidavit suggests a willful masking of the CS's identity in order to mislead the reviewing judge as to the reliability of the information.

Finally, the basis of the CS's knowledge is never stated in the affidavit. Of course, the basis of Co-Defendant D2's knowledge of the burglaries is that Co-Defendant D2 *committed* those burglaries.

Why Detective [Detective] should have refrained from informing Judge Chavin that the CS was an incarcerated co-defendant who had committed the burglaries under investigation seems clear: to mislead the judge as to the CS's credibility. *See Burks v. Commonwealth*, 471 S.W.2d 298, 301 (Ky. 1971) ("[T]here simply can be no valid principle under which the identity of a known witness may be concealed from adversary parties in any kind of a judicial proceeding, criminal or civil.").

If the CS, the "another," and Co-Defendant D2 had all been revealed in the affidavit to have been the same person, the reliability of the information would have been called

immediately into question in the mind of any reviewing magistrate. By disguising the identity of the CS and the "another," and by deliberately omitting any mention Co-Defendant D2 at all, Detective [Detective] intentionally denied Judge Chavin the opportunity to weigh the reliability of the information upon which the warrant was based.

2. "[Defendant] and another" (*[Detective] Affidavit, at 2.*)

Detective [Detective] states in several places that "[Defendant] and another" committed burglaries. The "another" and the CS and Co-Defendant D2 are all the same person. By omitting the identity of both the CS and the "another," Detective [Detective]'s affidavit not only prevented the reviewing judge from assessing the informant's credibility, but also created the illusion that an additional, third person was involved, either as perpetrator or informant. As above, the choice to conceal D2's identity is misleading as to D2's credibility.

3. "had been committed" (*[Detective] Affidavit, at 2.*)

Detective [Detective]'s affidavit states that "[t]he CS also stated that several burglaries had been committed out of Jefferson County, in the Finchville and Taylorsville areas." *[Detective] Affidavit, at 2.* The use of the passive voice here gives no indication of who is alleged to have committed these burglaries. Was it the CS? If Defendant [Defendant] is alleged to have committed them, why does the affidavit not state this? The passive construction "had been committed" is pure, unsubstantiated insinuation, and appears to be another attempt by the affiant to obscure the fact that the source of the information in the affidavit was not reliable.

4. "entering/exiting" home, "operating" car (*[Detective] Affidavit, at 3.*)

Detective [Detective]'s independent investigation of Defendant [Defendant] revealed that "[Defendant] has been observed entering/exiting [address of Defendant] on numerous occasions." *[Detective] Affidavit, at 3.* [Address of Defendant] was Defendant's residence. There is no

indication that detectives observed anything illegal or even suspicious in Defendant's entrances and exits. Similarly, "[h]e has also been observed operating the 2003 Volkswagen to be searched." *Id.* Again, nothing illegal or suspicious was observed in Defendant's operation of the car.

These innocent activities are not linked in the affidavit to any criminal or suspicious activity. Instead, these statements are followed by (i) the misleading statement immediately below and (ii) a laundry list of four (4) burglaries for which "detectives" had "found" reports that are not described as linked to Defendant but that Co-Defendant D2 had admitted to committing. The inclusion of Defendant's innocent activities next to Co-Defendant D2's admitted burglaries appears designed to mislead the reviewing magistrate into believing that Defendant had been observed committing illegal activities (see 5. immediately *infra*).

5. "During surveillance [Defendant] has been observed committing acts in violation of the Kentucky Revised Statutes." [Detective] Affidavit, at 3.

These alleged criminal acts are not described anywhere in the affidavit. It is difficult to imagine a more vague criminal accusation. If there is a portion of the affidavit that cries out most for elaboration, it is this declaration that specific violations of the KRS were observed. What were these alleged acts? Who observed them? Again, because this vague, misleading statement is immediately followed by a laundry list of four (4) burglaries for which "detectives" had "found" reports, the statements appear calculated to mislead the reviewing judge into thinking that Defendant had been observed committing criminal offenses.

6. "property/evidence" ([Detective] Affidavit, at 3.)

Detective [Detective] writes that "Detectives believe there may be property/evidence from the above burglaries, as well as others, located at [address of Defendant]." *[Detective] Affidavit, at 3.*

This statement is tremendously broad and, coupled with the misleading statements analyzed above and the lack of particularity discussed below, amounts to the sort of "fishing expedition" prohibited by both the U.S. and Kentucky Constitutions. Significantly, the June 7, 2004 search of Defendant's residence did not reveal any handguns, "longguns," or coins. While small amounts of "jewelry" and "computer equipment" were found in the search (see the "particularity" discussion immediately below in section II), the alleged stolen items were not described with any particularity that would allow the investigating officers to determine what they were looking for. Thus, because the alleged stolen items were not described with any particularity in the affidavit, there could be no corroboration of the information provided by Co-Defendant D2 once the home and car were searched.

Where an officer misleads a judge concerning the reliability of the information in an affidavit, the officer cannot be said to have had an objectively reasonable belief in the probable cause determination. *See Guth v. Commonwealth*, 29 S.W.3d 809, 812 (Ky.App. 2000), *citing Crayton, supra*, at 687-688. For all the reasons above, the warrant issued for Defendant's home and car should be voided and any evidence obtained thereby suppressed.

II. THE AFFIDAVIT UPON WHICH THE SEARCH WARRANT WAS ISSUED DID NOT INDICATE THE "THINGS TO BE SEIZED" WITH PARTICULARITY

A. Legal Standards

The Fourth Amendment to the U.S. Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *U.S. Const., Amend. IV*. Section 10 of the Kentucky Constitution provides that "no warrant shall issue to search any place, or seize any

person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." *Ky. Const.* § 10.

B. Unconstitutional Lack of Particularity in the Warrant

Detective [Detective]'s affidavit describes five categories of items that D2 claimed in his June 4, 2004 interview were stolen in the burglaries of which Defendant and D2 have been accused: "handguns, jewelry, longguns [sic], coins, and computer equipment." *[Detective] Affidavit, at 2.* The search pursuant to the warrant resulted in the seizure of over one hundred (100) items that do not fall into any of these categories. *See LMPD Seized Property list, attached as Exhibit 3.* There were no coins, no guns, approximately eight (8) pieces of jewelry and two (2) computers.

"[I]f the purpose of the search is to find a specific item of property, it should be so particularly described in the warrant as to preclude the possibility of the officer seizing the wrong property." *Evans v. Commonwealth*, 116 S.W.3d 503, 507 (Ky.App. 2003). "Jewelry" and "computer equipment" are broad categories of items that might be found in *any* home. Moreover, "jewelry" and "computer equipment" are not contraband, and thus they may not be "described generally as to [their] nature or character" as is the case with illegal substances. *See id.*

Because Detective [Detective] and the LMPD were actively investigating the specific burglaries listed in the affidavit, they doubtless had knowledge of specific items that had been stolen. Indeed, Detective [Detective] indicates that he had pulled police reports on these burglaries. *[Detective] Affidavit, at 3.* These reports almost certainly listed the specific items alleged to have been stolen, thus Detective [Detective] had access to their descriptions, yet did not put these descriptions in the affidavit to let investigating officers know just what they were looking for.

The U.S. and Kentucky Constitutions require that a *particular* description, however brief, of these alleged stolen items be included in the affidavit. *See Evans, supra*, at 507. For example, if a

piece of "jewelry" had been burgled from one of the victimized premises mentioned in the affidavit, the particularity requirement could easily have been satisfied by simply describing a "diamond necklace," or a "ruby bracelet," or whatever item was listed in the pulled police report.

Similarly, the particularity requirement of the U.S. and Kentucky Constitutions would require that "computer equipment" be described beyond this broad categorization. Finding two (2) computers in an American home is hardly corroboration of criminal activity. And again, no coins or guns were found. As it stands, the description in the affidavit could have applied to *any* home in Jefferson County that contained "jewelry" or "computer equipment" on June 9, 2004. Even with the affidavit physically attached to the warrant, an officer could not know *what* he or she was looking for in Defendant's home.

This case is directly analogous to *Crum v. Commonwealth*, 223 S.W.3d 109 (Ky.App.2007). In the *Crum* affidavit, "the thing to be seized is described only as 'illegal contraband,' the informant is not named, and the officer's reason for believing the informant to be reliable is not stated." *Crum*, 223 S.W.3d at 112. "Jewelry" and "computer equipment," like the "illegal contraband" in *Crum*, can refer to "any number of things." *Id.* However, unlike illegal contraband, "jewelry" and "computer equipment" can be expected to be found in any American home.

Just as in *Crum*, the informant here was known but not named. Just as in *Crum*, the basis of the informant's knowledge was not stated. Thus, in this case, just as in *Crum*, "[o]n the whole, it is impossible to tell the basis of the officer's knowledge or exactly what he is looking for." *Id.* As a consequence, "[t]he affidavit is so lacking in indicia of probable cause that any warrant issued on it must likewise be lacking." *Id.* For these reasons, the warrant issued for Defendant's home and car should be voided.

III. THE LEON GOOD-FAITH EXCEPTION DOES NOT APPLY BECAUSE, WHERE AN AFFIDAVIT CONTAINS MISLEADING INFORMATION, THE POLICE OFFICER CANNOT HAVE AN OBJECTIVELY REASONABLE BELIEF IN THE SUFFICIENCY OF THE WARRANT

Even if the Court were to find the warrant to be defective, "[t]he 'good faith' exception announced in *United States v. Leon*, applicable when police conduct a search under a search warrant later found defective, is unavailable when the affidavit contains false or misleading information." *Commonwealth v. Smith*, 898 S.W.2d 496, 504 (Ky.App.1995), citing *Crayton v. Commonwealth*, 846 S.W.2d 684, 687 (Ky.1992), citing *United States v. Leon*, 468 U.S. 897 (1984). Where an affidavit contains "misleading information, the officer's reliance cannot be reasonable." *Crayton*, at 687-688. An "officer must have an objectively reasonable belief in the sufficiency of the warrant and the probable cause determination." *Id.* at 687. Because of the intentionally misleading statements outlined above, Detective [Detective]'s belief in the sufficiency of the warrant cannot have been objectively reasonable.

Franks v. Delaware, 438 U.S. 154 (1978), holds that when a person challenging the validity of a search warrant makes a sufficient showing that some part of the affidavit supporting the warrant was deliberately falsely made, or was made with reckless disregard for the truth, and when that part of the affidavit is excluded the remaining part contains insufficient probable cause to support issuance of the warrant, a hearing is required. *Franks*, 438 U.S. at 171-72. The purpose of a "*Franks* hearing" is to determine whether or not the non-offending portion of the affidavit was indeed sufficient to support issuance of a search warrant or whether the warrant must be voided. Based on the legal arguments above, Defendant now requests such a hearing before this honorable Court.

CONCLUSION

The affidavit supporting the warrant in this case contained several misleading statements that were made with reckless disregard for the truth in an attempt to prevent the reviewing judge from assessing the reliability of the information in the affidavit. Without these misleading statements, analyzed in detail *supra*, the affidavit lacks sufficient facts to support an objectively reasonable belief that probable cause existed. In addition, the warrant failed to meet its constitutional burden of describing with particularity the things to be seized in a search pursuant to the warrant.

WHEREFORE, Defendant requests that the Court grant a hearing under RCr 9.78 and pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), wherein defendant will move to have the constitutionally-insufficient search warrant voided, and to have evidence seized as a result of said warrant suppressed.

Respectfully submitted,

[REDACTED]
Counsel for Defendant