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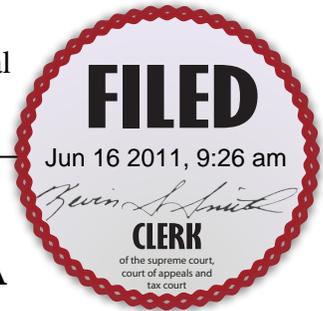
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**IN THE
COURT OF APPEALS OF INDIANA**

ERIC R. BELL,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 47A04-1008-CR-489

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William G. Sleva, Judge
Cause No. 47D02-0810-FD-928

June 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

In this interlocutory appeal, Eric Bell appeals the denial of his motion to suppress evidence obtained upon the execution of a search warrant. Bell raises one issue which we revise and restate as whether the trial court erred in denying his motion to suppress evidence obtained upon the execution of a search warrant. We affirm.

The relevant facts follow. On October 14, 2008, the trial court held a probable cause hearing in which Lawrence County Police Department Officer Aaron Shoults testified that he received information of a “marijuana grow located at a residence at 2436 I Street in Bedford . . . Indiana” provided by a confidential informant (the “CI”). Appellant’s Appendix at 42. Officer Shoults testified that the CI had observed the grow operation in the residence “as recently as . . . October 7, 2008,” and that the operation included “grow lights, power supply amplifiers, [and] seeds” and was “located in a yard behind the residence.” Id. The CI also stated that he was “selling drugs for the home owner,” and that he would have “had no knowledge that this person was involved in that type of activity if they wouldn’t have indicated” it.¹ Id. at 43. Officer Shoults also testified that based upon his “training and experience as a law enforcement officer” he knew that marijuana grow operations were “ongoing” because “it takes a while for the marijuana to grow” Id. at 44. Based upon Officer Shoults’s testimony, the court issued a search warrant which “AUTHORIZED, DIRECTED AND COMMANDED” the police to “search for and seize . . . [m]arijuana, grow lights, power supply/amplifiers, seeds, fertilizers, and other materials used in the cultivation of marijuana, paraphernalia,

¹ We note that in his deposition Officer Joe Fender referred to the CI also as “he.” Appellant’s Appendix at 52.

U.S. currency, ledgers or other written documentation evidencing dealing in marijuana” from the premises located at 2436 I Street in Bedford. Defendant’s Exhibit D.

Bell’s residence was searched pursuant to the search warrant and officers seized items including “26 white tablets marked 54 and 142,” an “aluminum case containing a clear plastic baggie and green leafy residue,” various containers holding marijuana seeds, and two electronic scales. Appellant’s Appendix at 14-15. On October 16, 2008, Bell was charged with Count I, possession of a controlled substance as a class D felony; Count II, maintaining a common nuisance as a class D felony; and Count III, possession of marijuana as a class A misdemeanor. On July 23, 2009, Bell filed a motion to suppress the evidence obtained upon the execution of the search warrant stating that “the State has failed to establish the reliability or credibility of the CI and that the issuance of the search warrant violates” his rights under the Federal and Indiana Constitutions. *Id.* at 18. On August 3, 2009, the State filed a reply memorandum to Bell’s motion to suppress and supporting memorandum of law.

On February 22, 2010, the court held a suppression hearing, and in June 2010 the court entered an order denying Bell’s motion. On July 7, 2010, Bell filed a motion to certify the trial court’s order for interlocutory appeal. The trial court certified the order, and we accepted jurisdiction pursuant to Ind. Appellate Rule 14(B).

The issue is whether the trial court erred in denying Bell’s motion to suppress. Bell argues that (A) the State “violated [his] Federal and State constitutional right to be free from unreasonable search and seizure; U.S. Const. Amendments XIV & IV, Ind.

Const. Art. I § 11; when a search warrant was obtained to search Bell’s residence without valid probable cause;” and (B) “[t]he good faith exception should not apply because of a lack of indicia of probable cause caused by indifference, a lack of investigative curiosity as to the CI’s facts, and a casual disregard to investigating the *bona fides* of the hearsay CI source.” Appellant’s Brief at 4, 26.

We begin by addressing Bell’s argument that the search warrant was not supported by valid probable cause. We have previously set out the standard of review and law regarding probable cause to support search warrants:

In deciding whether to issue a search warrant, “[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983). The duty of the reviewing court is to determine whether the magistrate had a “substantial basis” for concluding that probable cause existed. Id. at 238-39, 103 S. Ct. 2317. A substantial basis requires the reviewing court, with significant deference to the magistrate’s determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. Houser v. State, 678 N.E.2d 95, 99 (Ind. 1997). A “reviewing court” for these purposes includes both the trial court ruling on a motion to suppress and an appellate court reviewing that decision. Id. at 98. Although we review de novo the trial court’s substantial basis determination, we nonetheless afford “significant deference to the magistrate’s determination” as we focus on whether reasonable inferences drawn from the totality of the evidence support that determination. Id. at 98–99.

Brown v. State, 905 N.E.2d 439, 444 (Ind. Ct. App. 2009) (quoting State v. Spillers, 847 N.E.2d 949, 952-953 (Ind. 2006)). A reviewing court must confine its review to the “evidence presented to the issuing magistrate and not *post hac* justifications for the

search.” Jaggers v. State, 687 N.E.2d 180, 182 (Ind. 1997) (citing Seltzer v. State, 489 N.E.2d 939, 941 (Ind. 1986)).

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.

The text of Article 1, Section 11 of the Indiana Constitution contains nearly identical language. Jackson v. State, 908 N.E.2d 1140, 1143 (Ind. 2009). These constitutional principles are codified in Ind. Code § 35-33-5-2, which details the information to be contained in an affidavit for a search warrant. Spillers, 847 N.E.2d at 953.

Accordingly, Indiana Code § 35-33-5-2(a) provides in relevant part:

[N]o warrant for search or arrest shall be issued until there is filed with the judge an affidavit:

- (1) particularly describing:
 - (A) the house or place to be searched and the things to be searched for; or
 - (B) particularly describing the person to be arrested;
- (2) alleging substantially the offense in relation thereto and that the affiant believes and has good cause to believe that:
 - (A) the things as are to be searched for are there concealed; or

(B) the person to be arrested committed the offense; and

(3) setting forth the facts then in knowledge of the affiant or information based on hearsay, constituting the probable cause.

Also, if an affidavit used to establish probable cause is based on hearsay, the affidavit must either:

- (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or
- (2) contain information that establishes that the totality of the circumstances corroborates the hearsay.

Ind. Code § 35-33-5-2(b). A judge may issue a search warrant absent an affidavit, as was done in this case, only if “the judge receives sworn testimony of the same facts required for an affidavit.” Ind. Code § 35-33-5-8.

The Indiana Supreme Court has determined that uncorroborated hearsay from a source whose credibility is itself unknown cannot support the finding of probable cause to issue a search warrant. See Jagers, 687 N.E.2d at 182 (citing Gates, 462 U.S. at 227, 103 S. Ct. 2317)). The trustworthiness of hearsay for the purpose of proving probable cause can be established in a number of ways, including where: (1) the informant has given correct information in the past, (2) independent police investigation corroborates the informant’s statements, (3) some basis for the informant’s knowledge is demonstrated, or (4) the informant predicts conduct or activity by the suspect that is not

ordinarily easily predicted. Lanham v. State, 937 N.E.2d 419, 424 (Ind. Ct. App. 2010). These examples are not exclusive. Id. “Depending on the facts, other considerations may come into play in establishing the reliability of the informant or the hearsay.” Id. One such additional consideration is whether the informant has made a declaration against penal interest. Id.

The State claims that the CI’s credibility was established when he or she made a “statement against the informant’s penal interests” that “he or she was ‘selling drugs’ for [Bell].” Appellee’s Brief at 3, 7. The Indiana Supreme Court has held that such declarations against penal interest “can furnish sufficient basis for establishing the credibility of an informant.” Newby v. State, 701 N.E.2d 593, 599 (Ind. Ct. App. 1998) (citing Houser, 678 N.E.2d at 100). A statement against the declarant’s penal interest is one that tends to subject the declarant to civil or criminal liability such that a reasonable declarant would not have made the statement unless believing it to be true. Indiana Evidence Rule 804(b). However, the Court has also noted that in cases where the declarant “had been caught ‘red-handed,’” statements made by the declarant to the police which do not “tend to expose [the declarant] to any greater criminal liability” are “less a statement against [] penal interest than an obvious attempt to curry favor with the police” Hirshey v. State, 852 N.E.2d 1008, 1013, 1013 n.1 (Ind. Ct. App. 2006) (quoting Spillers, 847 N.E.2d at 956), trans. denied.

Bell argues that although the CI’s statement that “I sold drugs for the homeowner” “sound[s], to the ear, like a ‘statement against penal interest,’ [S]everal other factors

for analysis should be employed and directed toward the statement” Appellant’s Brief at 10. Bell argues that “[t]he statement does not subject the CI to criminal prosecution” and that the CI “was never threatened with such prosecution” Id. Bell also argues that “there is a casualness to the State’s approach at the probable cause hearing,” and that “[t]here is no EASY BUTTON that can be pressed by a prosecutor to establish the reliability or credibility of a CI” Id. at 10-11.

Here, the circumstances known to the trial court in its determination of admissibility include that Officer Shoults had received information through a CI that the CI had observed a marijuana grow operation located in a yard behind Bell’s residence as recently as a week prior to the hearing. The CI indicated that he was “selling drugs for the home owner” which was a statement incriminating himself. Appellant’s Appendix at 43. The CI had not been caught in the commission of an unlawful act, nor was he facing a criminal charge such that he might have been motivated to “curry favor” with the police. Furthermore, the CI admitted criminal activity under circumstances in which such activity would likely have gone undetected. Accordingly, the trial court acted within its discretion in admitting the evidence seized at Bell’s residence.² See Lanham, 937 N.E.2d at 424 (holding that declarant who was not facing a criminal charge or had not been caught committing an unlawful act and who incriminated herself to the police by making statements against her penal interest provided a substantial basis in finding probable cause to grant a search warrant of defendant’s residence).

² Because we find that probable cause existed we need not address whether the good faith exception applies.

For the foregoing reasons, we affirm the trial court's denial of Bell's motion to suppress evidence.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.