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IN THE
COURT OF APPEALS OF INDIANA

TRACEY WHEELER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-0809-CR-412
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael J. Lewis, Judge
Cause No. 84D06-0709-FA-2987

July 7, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Tracey Wheeler ("Wheeler") was convicted in Vigo Superior Court of three counts of Class A felony dealing in cocaine, one count of Class A felony possession of cocaine with intent to deliver, and one count of Class D felony maintaining a common nuisance. The trial court sentenced Wheeler to an aggregate term of thirty-five years. Wheeler challenges the validity of the search warrant that recovered the evidence used against him at trial. He argues that the trial court abused its discretion when it admitted evidence obtained pursuant to an allegedly invalid search warrant. We affirm.

Facts and Procedural History

The Vigo County Drug Task Force ("Drug Task Force") conducted three controlled purchases of cocaine at Wheeler's residence on September 5, 2007, September 13, 2007, and September 17, 2007. The Drug Task Force conducted these controlled purchases through a confidential informant ("the C.I."). Prior to each controlled buy, the C.I. and his vehicle were thoroughly searched before the C.I. was wired and given photocopied money to make the purchase. Detective Lewis saw the C.I. enter Wheeler's residence prior to each buy. During each buy, the C.I. was being monitored by officers with the task force from the moment he left their custody until he returned after the buy. After each buy, the C.I. returned with cocaine.

Following the third controlled buy, Detective Denzil Lewis ("Detective Lewis") contacted Judge Michael Eldred ("Judge Eldred") by phone to request a search warrant for the house where the C.I. had purchased the cocaine. Detective Lewis identified the house that would be the subject of the search. He then stated that the search would be for

drugs, drug paraphernalia, money (including Drug Task Force buy money), records related to the sale of drugs, surveillance devices, and indicia of occupancy.

Detective Lewis then set forth the facts underlying the request for a search warrant.

> The following version of the incident is what I was able to witness, what affiant was able to witness, after viewing the audio/video recording speaking with the C.I. The C.I. entered the residence where the C.I. was met by Tracey Wheeler, the resident. After a short conversation, both subjects walked upstairs. Tracey Wheeler sat on a couch. The C.I. said that Mr. Wheeler put on rubber gloves. I was able to witness Mr. Wheeler wearing latex gloves. I was also able to witness Mr. Wheeler weighing a substance in a plastic bag on a set of scales which were sitting just south of the couch. The C.I. said that the C.I. witnessed an additional amount of crack/cocaine which the C.I. did not purchase from Mr. Wheeler. The C.I. said that the C.I. handed Mr. Wheeler the Drug Task Force buy money, the C.I. said that Mr. Wheeler gave the C.I. a plastic bag containing a rock substance which Mr. Wheeler was weighing on the scales. After the transaction the C.I. exited 1453 Barbour Avenue and got into the vehicle. The C.I. was under constant audio/video or visual contact with the detectives during the transaction. The C.I. met with the affiant at a predetermined location. The C.I. handed affiant the plastic bag containing a rock substance. Affiant conducted a field test of a representative sample of the substance that tested conclusively as cocaine. Affiant is certified in the field testing of controlled substances. Affiant conducted a search of the C.I. No money or drugs were located on the C.I. The affiant also conducted a search of the vehicle utilized to transport the C.I. Also there were no money or drugs located in the vehicle.

Ex. Vol., Defendant's Ex. A, pp. 2-9.

With regard to the reliability of the C.I., Detective Keen stated in his affidavit that:

> Affiant has worked with the C.I. in the past. The C.I. is proven reliable and credible. The C.I. has made controlled purchases of controlled substances in the past. Affiant has viewed prior video taped controlled purchases of controlled substances which the C.I. has made. The C.I. has always been forthright and honest in regard to the C.I.'s ability to purchase drugs.

Id.

Based on those facts, Detective Lewis asked for and received a warrant to search Wheeler's residence at 1435 Barbour Avenue in Terre Haute, Indiana. The police acted upon the warrant and entered the residence. However, Wheeler was not present at that moment but was expected back in short order. Wheeler returned to the residence and was arrested. The police searched the residence and found drugs, drug paraphernalia, items used to distribute drugs, money, a gun, cell phones, Wheeler's identification card, an electric bill in Wheeler's name for the 1435 Barbour Avenue residence, and other indicia of occupancy.

On September 21, 2007, the State charged Wheeler with three counts of Class A felony dealing in cocaine, one count of Class A felony possession of cocaine with intent to distribute, one count of Class D felony maintaining a common nuisance, and one count of Class B felony possession of a firearm by a serious violent felon. Wheeler filed a motion to suppress on January 23, 2008. However, no hearing was held on the motion, and no order issued regarding the motion to suppress.

A four-day jury trial began on July 21, 2008. On the second day of the trial, during the State's case-in-chief, Wheeler objected to the introduction of evidence collected pursuant to the search warrant issued on September 17, 2007. The trial court overruled the objection. Wheeler was convicted of three counts of Class A felony dealing in cocaine, one count of Class A felony possession of cocaine with intent to distribute, and one count of Class D felony maintaining a common nuisance. On August 18, 2008, the trial court sentenced Wheeler to thirty-five years on each of the Class A

felony charges and two years on the Class D felony, to be served concurrently. Wheeler now appeals.

Discussion and Decision

Wheeler challenges the validity of the search warrant that recovered the evidence used against him at trial. He argues that the trial court abused its discretion when it admitted evidence obtained pursuant to an allegedly invalid search warrant. The admission and exclusion of evidence lies within the sound discretion of the trial court; therefore we review admission of testimony for abuse of that discretion. State v. Lloyd, 800 N.E.2d 196, 198 (Ind. Ct. App. 2003). Such an abuse occurs when the "decision is clearly against the logic and effect of the facts and circumstances." Id.

A court may issue warrants only upon probable cause. Indiana Code section 35-33-5-1, See U.S. Const. 4th amend. IV, Ind. Const. article I, § 11. We have stated:

> In deciding whether to issue a search warrant, the task of the issuing magistrate is 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. The reviewing court is required to determine whether the magistrate had a substantial basis for concluding that probable cause existed. 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[s] the determination of probable cause. A reviewing court for these purposes includes both the trial court ruling on a motion to suppress and an appellate court reviewing that decision. In our review, we consider only the evidence presented to the issuing magistrate and may not consider post hoc justifications for the search.

Hensley v. State, 778 N.E.2d 484, 487 (Ind. Ct. App. 2002) (citations and quotations omitted).

Indiana's warrant statute, Indiana Code section 35-33-5-2, provides, in pertinent part, that a judge generally may not issue a search warrant without an affidavit that: (1) particularly describes the house or place to be searched and the things to be searched for; (2) alleges substantially the offense in relation thereto and that the affiant believes and has good cause to believe that the things as are to be searched for are there concealed; and (3) sets forth the facts then in knowledge of the affiant or information based on hearsay, constituting probable cause. However, a judge may issue a search warrant without such an affidavit if, as here, the judge receives sworn testimony of the facts required for the affidavit. Ind. Code § 35-33-5-8(a)(2),(d) (2004).

In this case, Detective Lewis sought a search warrant based on the results of a controlled drug buy. In Flaherty v. State, 443 N.E.2d 340, 341, (Ind. Ct. App. 1982), we explained the mechanics of a controlled buy:

> "A controlled buy consists of searching the person who is to act as the buyer, removing all personal effects, giving him money with which to make the purchase, and then sending him into the residence in question. Upon his return he is again searched for contraband. Except for what actually transpires within the residence, the entire transaction takes place under the direct observation of the police. They ascertain that the buyer goes directly to the residence and returns directly, and they closely watch all entrances to the residence throughout the transaction."

(quoting Mills v. State 177 Ind.App. 432, 434, 379 N.E.2d 1023, 1026 (1978)). So long as the "controls are adequate, the affiant's personal observation of a controlled buy may be sufficient as grounds for finding probable cause." Methene v. State, 720 N.E.2d 384, 390 (Ind. Ct. App. 1999). Under such circumstances, even where the informant is not reliable, a court may accept the personal observations of the attesting officer as establishing probable cause. Flaherty, 443 N.E.2d at 341.

In this case, Detective Lewis stated that he searched Davis and his vehicle prior to giving Davis buy money and sending him to make the purchase. Detective Lewis placed audio and video recording devices on Davis that recorded the transaction. Davis and his vehicle were searched upon his return from making the drug purchase. During the entire drug buy, Davis was under direct visual surveillance or under audio/video surveillance.

Prior to seeking the search warrant, Detective Lewis reviewed the videotape of the controlled buy provided by Davis. The facts presented by Detective Lewis to Judge Eldred were sufficient to establish probable cause to obtain a warrant to search the residence in question. Under these facts and circumstances, the trial court did not abuse its discretion when it admitted the evidence in question, because the underlying search warrant that recovered the evidence was valid.

Affirmed.

RILEY, J., and KIRSCH, J., concur.