

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES DARREN COLBERT,)
)
 Appellant,)
)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee,)

NOT FOR PUBLICATION
Case No. F 2013-1106

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB - 4 2015

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LEWIS, JUDGE:

Appellant, James Darren Colbert, was tried by a jury and convicted of, count one, trafficking in illegal drugs (cocaine) in violation of 63 O.S.2011, § 2-415, count two, possession of a firearm during the commission of a felony in violation of 21 O.S.2011, § 1287, count three, possession of a firearm after former conviction of a felony in violation of 21 O.S.2011, § 1283, count four unlawful use of a police radio in violation of 21 O.S.2011, § 1214, all after former conviction of two or more felony convictions; Colbert was also convicted of misdemeanor offenses; count five, possession of marijuana in violation of 63 O.S.2011, § 2-402 and, count six, unlawful possession of drug paraphernalia in violation of 63 O.S.2011, § 2-405; all in Osage County District Court case number CF-2012-291 before the Honorable B. David Gambill, Associate District Judge. Judge Gambill sentenced Colbert in accordance with the jury verdict to fifty (50) years on count one; twelve (12) years on counts two and three; four (4) years on count four; and one (1) year each on counts five and

six, ordering that the sentences be served concurrently. From these judgments and sentences Colbert has perfected this appeal, raising the following proposition of error.

The magistrate lacked probable cause to issue the search warrant because the information contained in the supporting affidavit was impermissibly stale. Consequently, the trial court erred in refusing to suppress the items seized pursuant to the warrant.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we have determined that Colbert's convictions should be **AFFIRMED**.

At trial and on appeal, Colbert alleges that the warrant was void because it was not served within ten days from its issuance in violation of 22 O.S.2011, § 1231, thus the information in the affidavit was stale. The evidence was introduced over Colbert's contemporaneous objections.

In reviewing a trial court's ruling denying a motion to suppress, we defer to the trial court's factual findings unless they are clearly erroneous. *Burton v. State*, 2009 OK CR 10, ¶ 9, 204 P.3d 772, 775. In doing so we view the evidence in a light most favorable to the State. *Coffia v. State*, 2008 OK CR 24, ¶ 5, 191 P.3d 594, 596. We review the trial court's legal conclusions de novo. *State v. Terry*, 2014 OK CR 14, ¶ 6, 334 P.3d. 953, 955.

Here, officers obtained a search warrant for Colbert's residence on July 20, 2012, but for reasons irrelevant to our discussion, a second warrant was obtained on July 26, 2012, and the search warrant was served on August 2, 2012. Evidence of the crimes for which Colbert was convicted was discovered during the search of his residence.

While the ten day statutory requirement is a means of preventing stale warrants from being served,¹ nothing in our case law prohibits an officer from returning to a magistrate to obtain a new search warrant if the initial warrant cannot be served within the ten day time limitation, or for other reasons the warrant is faulty. The only issue is whether the information in the affidavit used to procure a warrant still supports probable cause to believe that contraband or evidence of a crime will be found in the place to be searched, under a totality of the circumstances approach.

The standard for review for the validity of a search warrant is the totality of circumstances. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); accord *Langham v. State*, 787 P.2d 1279 (Okl.Cr.1990). Under the totality of the circumstances approach, the task of the issuing magistrate is to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The reviewing court's duty is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Langham*, 787 P.2d at 1281. Furthermore, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id.*

Lynch v. State, 1995 OK CR 65, ¶ 18, 909 P.2d 800, 804-05. The test for staleness "depends upon the nature of the underlying circumstances and concepts." *Gregg v. State*, 1992 OK CR 82, ¶ 15, 844 P.2d 867, 874. As long as the latter search warrant is served within ten days and is not based on stale

¹ See *Viadock v. State*, 1925 OK CR 272, 30 Okl.Cr. 374, 376, 236 P. 56 ("It will be observed that the statute makes the warrant void if not executed in 10 days, this being for the purpose of prohibiting promiscuous search on stale warrants, and limits validity to a period of 10 days.")

information, an individual's constitutional right against unreasonable search and seizure is protected.

The affidavit in this case sought evidence of gun ownership and possession by a convicted felon. Neither the convicted felon, nor the evidence was likely transitory. We find, therefore, that the information in the affidavit was not stale. Further, based on the above, we find that the warrant was served in compliance 22 O.S.2011, § 1231.

The trial court in this case did not err in failing to suppress the evidence.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY
HONORABLE B. DAVID GAMBILL, ASSOCIATE DISTRICT JUDGE

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OPINION BY: LEWIS, J.

SMITH, P.J.: Concur

LUMPKIN, V.P.J.: Concur

JOHNSON, J.: Concur