

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Appellant,

v.

JASON ALEXANDER GIDDINGS,

Appellee.

)
)
) NOT FOR PUBLICATION
)
)
) Case No. S-2016-517
)
)
)
)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 18 2017

OPINION

PER CURIAM:

MICHAEL S. RICHIE
CLERK

Appellee Jason Alexander Giddings was charged in Tulsa County District Court, Case Number CF-2015-3794, with Aggravated Trafficking in Illegal Drugs (Cocaine) in violation of 63 O.S.2011, § 2-415 (Count 1), Trafficking in Illegal Drugs (Heroin) in violation of 63 O.S.2011, § 2-415 (Count 2), Trafficking in Illegal Drugs (MDMA) in violation of 63 O.S.2011, § 2-415 (Count 3), Unlawful Possession of a Controlled Drug with Intent to Distribute in violation of 63 O.S.2011, § 2-401(A)(1) (Count 4), Possession of a Firearm in the Commission of a Felony in violation of 21 O.S.2011, § 1287 (Count 5), and Possession of a Firearm After Former Conviction of a Felony in violation of 21 O.S.2011, § 1283. He was charged After Former Conviction of Two or More Felonies.

Preliminary Hearing was held on October 1, 2015 before the Honorable David Youll, Special District Judge. At preliminary hearing Count 3 was dismissed and Giddings was bound over on the remaining counts. On April 18, 2016, Giddings filed a motion to suppress search warrant. A hearing was held on this motion on June 14, 2016, before the Honorable James M. Caputo, District

Judge, who granted Giddings' motion to suppress. The State of Oklahoma, appeals the suppression order. We exercise jurisdiction pursuant to 22 O.S.2011, § 1053, reverse the district court's suppression order, and remand for further proceedings.

BACKGROUND

In May of 2015, Tulsa Police Officer William MacKenzie was in contact with a reliable confidential informant (RCI) who had assisted law enforcement officers for five years and had on all occasions provided corroborated or substantiated information regarding the sales and distribution of controlled dangerous substances and/or individuals illegally in possession of firearms. The RCI had made controlled purchases of drugs for police officers in the past and on this date the RCI told Officer MacKenzie about a person selling large quantities of cocaine and heroin. The RCI informed MacKenzie that the person selling drugs was Jason Giddings and the RCI provided information about the apartment where Giddings lived, as well as information about Giddings' vehicle and phone number.¹

The officers determined that Giddings was living in apartment 2003 at 8001 South Ming o Road and on May 12, 2015, Tulsa Police Officers conducted surveillance on that apartment. They observed the pickup they were advised that Giddings drove and they confirmed that the apartment was leased to

¹ It was discovered that this phone number was tied to two different DEA cases, one of which involved the trafficking of cocaine.

Jason Giddings' aunt.² During the time the apartment was under surveillance, other officers prepared to conduct a controlled purchase of drugs from Giddings. They searched the RCI and the RCI's vehicle and no controlled substances were found. Officers gave the RCI money with which the RCI could make the controlled purchase and as officers watched the RCI traveled to meet an unwitting confidential informant (UCI). The RCI and UCI got into a car together in a parking lot and traveled together to the residence occupied by Giddings. Officers watched as the RCI and UCI walked from the apartment parking lot to the apartment where Giddings lived. Officers conducting surveillance then waited and watched as the RCI and UCI left the apartment and returned to the car in the apartment parking lot. They drove to the place where the RCI's vehicle had been parked and parted ways. The UCI left and the RCI drove to a pre-determined location where the RCI met with Officer MacKenzie and another police officer. When the RCI exited the vehicle, the RCI handed Officer MacKenzie a quantity of a white powder-like substance that field-tested positive for cocaine.

Based upon the RCI's purchase, the officers' training and experience, the information that Giddings' telephone number was connected to two ongoing DEA cases, and the observation of short term traffic at the apartment occupied by Giddings, a search warrant affidavit was prepared and a warrant for the search of the apartment occupied by Giddings was secured on July 3, 2015. The warrant was executed the same day. Inside the apartment the police found

² The RCI told Officer MacKenzie that the apartment was leased in Giddings' aunt's name in an effort to conceal his location from law enforcement.

large quantities of marijuana, cocaine, and heroin, as well as approximately \$50,000.00 cash, a gun, and numerous items related to the packaging and distribution of drugs. Giddings was in the apartment along with three other individuals at the time it was searched. He told the officers that the drugs in the apartment belonged to him.

Giddings was charged and bound over for trial after a preliminary hearing held on October 1, 2015. On April 18, 2016, Giddings filed a motion to suppress the evidence found during the search of his apartment. In this motion Giddings argued that the State lacked probable cause to support the search warrant. On June 14, 2016, a hearing was held on the motion to suppress. The district court sustained the motion to suppress ruling that the participation of the unwitting confidential informant in the drug purchase prohibited a finding of probable cause because the transaction had been compromised; the drug purchase was no longer controlled once the UCI became involved because the UCI had not been searched and his reliability and veracity were not known to the officers. The State appeals the district court's order sustaining Giddings' motion to suppress.

DISCUSSION

The State appeals under the authority of 22 O.S.2011, § 1053(5), asserting that the suppressed evidence forms the entirety of the proof supporting the charges against Giddings and that the prosecution cannot proceed if the motion to suppress is upheld. The State argues, therefore, that appellate review of the matter is in the best interests of justice. "[W]e define the phrase 'best interests of

justice' to mean that the evidence suppressed forms a substantial part of the proof of the pending charge, and the State's ability to prosecute the case is substantially impaired or restricted absent the suppressed or excluded evidence." *State v. Sayerwinnie*, 2007 OK CR 11, ¶ 6, 157 P.3d 137, 139. We agree that appellate review of the case is proper under section 1053(5) and review the district court's decision for an abuse of discretion. See *State v. Nelson*, 2015 OK CR 10, ¶ 11, 356 P.3d 1113, 1117; *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950.

This Court looks to the totality of the circumstances when evaluating whether an affidavit provided probable cause to support issuance of a search warrant. *Marshall v. State*, 2010 OK CR 8, ¶ 49, 232 P.3d 467, 479; *Andrews v. State*, 2007 OK CR 30, ¶ 8, 166 P.3d 495, 497. Under the totality of the circumstances approach, "[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 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." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). For there to be a valid finding of probable cause, the affidavit must set forth enough underlying facts and circumstances to enable the magistrate to independently judge the affiant's conclusion that evidence of the crime is located where the affiant says it is. *Marshall*, 2010 OK CR 8 ¶ 49, 232 P.3d at 479. The duty of a reviewing court is to ensure that the magistrate had a substantial basis for

concluding that probable cause existed. *Gates*, 462 U.S. at 238-39, 103 S.Ct. at 2332. We accord a magistrate's finding of probable cause "great deference." *Id.* at 236, 103 S.Ct. at 2331. *See also Langham v. State*, 1990 OK CR 9, ¶ 7, 787 P.2d 1279, 1281.

A confidential informant's tip about the sale of drugs from a particular location may be corroborated by a controlled purchase of drugs. While police officers generally follow common formalities when conducting a controlled purchase of drugs, deviations from the standard procedures do not necessarily render the controlled purchase fatal or even inconsequential to a determination of probable cause. For example, "the absence of constant visual contact with the informant conducting the transaction does not render a controlled purchase insufficient, nor does the absence of an audio-recording of the transaction." *United States v. Artez*, 389 F.3d 1106, 1112 (10th Cir. 2004). The use of an unwitting informant in the controlled purchase, however, does introduce "an additional layer of uncertainty to the transaction because it leaves open the possibility that the narcotics were acquired not at the suspect residence but at the location where the confidential and unwitting informants met before and after the transaction." *Id.* Nonetheless, Courts have approved the use of unwitting informants in the controlled purchases of drugs finding that controlled purchases assisted by unwitting informants may corroborate a confidential informant's tip about the sale of illegal drugs. This was the case in both *Artez* and *United States v. Richardson*, 86 F.3d 1537, 1545 (10th Cir. 1996).

In *United States v. Artez*, the Salt Lake County Sheriff's Office was contacted by a CI who claimed to have information about a drug dealer named Fred Artez. While the CI stated that he could not purchase drugs directly from Artez, he claimed that he could purchase drugs from Artez through a UI. To facilitate the controlled purchase, law enforcement agents searched the CI and his vehicle for money and contraband. They found none and gave the CI money with which to make the controlled buy. The authorities watched as the CI made contact with the UI and the two drove together to Artez' residence where the UI left the CI behind in the vehicle and went alone into the residence. After about twenty minutes the UI exited the residence and the IU and CI drove back to the UI's residence where they both went inside. When the CI exited the UI's residence authorities followed the CI to a prearranged location where the CI handed over a quantity of suspected methamphetamine that the CI stated had been purchased from Artez through the UI. The CI was searched for money and none was found.

An affidavit for a search warrant was prepared in which the controlled purchase was listed as one of the facts corroborating the confidential informant's tip. Other corroborating facts included a tip from a second informant, police surveillance of the residence during which they observed a high volume of short term visitors to the residence consistent with drug trafficking, and the narcotics histories of the other residents. The Court concluded that while the information included within the affidavit did not "eliminate the risk that the confidential informant was lying or was in error" that risk did not need to be totally eliminated. *Artez*, 389 F.3d at 1115. Rather, what was required was that the

probability of a lying or inaccurate informer was “sufficiently reduced by corroborative facts and observations.” *Id.* The Court found that upon review of the totality of the circumstances, the information in the affidavit sufficiently reduced that risk. The Court held that the affidavit provided the magistrate a substantial basis for finding the existence of probable cause to search Artez’s residence.

This same result was reached by the Tenth Circuit Court of Appeals in an earlier case with similar but fewer corroborating facts. In *United States v. Richardson*, 86 F.3d 1537, 1545 (10th Cir. 1996), the search warrant affidavit stated that the informant told an officer that he could arrange to purchase a large amount of cocaine from Richardson and another person, Mr. Stone. The officer verified the identities of the alleged participants and a meeting was arranged. The officer watched the informant get into Stone’s vehicle. When the informant exited the vehicle he informed the officer that he had given the cash to Stone who was going to go to Richardson’s residence to purchase cocaine with the money the officer had provided. Officers watched as Stone entered Richardson’s driveway, exited the vehicle, disappeared from sight for twenty minutes, returned to the vehicle, and then left. When Stone returned from Richardson’s residence, the informant got back into Stone’s vehicle. When the informant went back to the officer he had cocaine allegedly purchased from Richardson by Stone. In addition to the controlled purchase, the affidavit also noted the informant’s numerous prior cocaine transactions with Richardson and Stone and the observation of Richardson’s residence. The Tenth Circuit

found that the evidence contained in the affidavit provided the magistrate with a sufficient basis for the conclusion that there was probable cause for issuing the warrant and for believing evidence of a crime would be found in Richardson's home.

As the Tenth Circuit Court of Appeals concluded in *Richardson* and *Artez*, we also find that the use of an unwitting informant for the controlled purchase was not fatal to the determination of whether probable cause existed to support the issuance of a search warrant. This was but a single factor among several corroborating the CI's tip that large quantities of cocaine and heroin would be found in the apartment where Giddings lived. We find that totality of the information included in the search warrant affidavit provided a substantial basis for the conclusion that probable cause existed to search the residence where Giddings lived. The district court's conclusion to the contrary was an abuse of discretion.

DECISION

The Order of the District Court of June 14, 2016, sustaining Giddings' motion to suppress is **REVERSED** and the matter **REMANDED** for further proceedings. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TILSA COUNTY
THE HONORABLE JAMES M. CAPUTO, DISTRICT JUDGE**

**APPEARANCES AT MOTION
HEARING**

MATT KEHOE
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER
TULSA, OK 74103
ATTORNEY FOR STATE

LARRY R. EDWARDS
ATTORNEY AT LAW
601 S. BOULDER
TULSA, OK 74119
ATTORNEY FOR DEFENDANT

APPEARANCES ON APPEAL

MATT KEHOE
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER
TULSA, OK 74103
ATTORNEY FOR APPELLANT

LARRY R. EDWARDS
ATTORNEY AT LAW
601 S. BOULDER
TULSA, OK 74119
ATTORNEY FOR APPELLEE

OPINION BY: PER CURIAM
LUMPKIN, P.J.: Concur in Results
LEWIS, V.P.J.: Concur
SMITH, J.: Concur
HUDSON, J.: Concur in Results

LUMPKIN, PRESIDING JUDGE: CONCUR IN RESULTS:

Two propositions of error have been raised on appeal: 1) the District Court erred in sustaining the motion to suppress based on law enforcement's use of an unwitting informant to facilitate a controlled buy; and 2) should this Court find there was not a substantial basis for the issuing magistrate's probable cause determination, the Good Faith Exception should apply. The Opinion decides the appeal on the first proposition of error, and rightly so. However, I disagree with the analysis used for the following reasons.¹

The Opinion does set forth the correct standard of review for determining the validity of a search warrant. *Marshall v. State*, 2010 OK CR 8, ¶ 49, 232 P.3d 467, 479 citing *Langham v. State*, 1990 OK CR 9, ¶ 6, 787 P.2d 1279, 1281 adopting totality of circumstances test set forth in *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). In the present case, we have a reliable confidential informant (RCI) and an unwitting third party involved in a controlled

¹ In this separate writing, I refer to the third party involved in the controlled drug buy in this case as an "unwitting third party." I question whether this case involves an "unwitting confidential informant" as used in the Court's opinion. The third party in this case did not provide any information or evidence which served as the basis for the search warrant. While he or she may be a witness later in the proceedings, he or she could not be considered an informant upon whose statements officers relied in seeking the search warrant. Calling the individual in this case an "unwitting confidential informant" only served to confuse the issues and the trial judge.

drug buy with Appellee. Utilizing an unwitting third party in a controlled drug buy, a not uncommon practice, does not somehow taint the controlled buy so as to eliminate it from consideration in the totality of the circumstances when determining the existence of probable cause. While the participation of an unwitting third party in a controlled drug buy can introduce an “additional layer of uncertainty to the transaction”, *see U.S. v. Artez*, 389 F.3d 1106, 1112 (10th Cir.2004), any potential uncertainty does not strip all corroborative value from the evidence. To the contrary, it is just additional evidence to be considered in a probable cause determination.

In the present case, police maintained surveillance on the RCI and the unwitting third party during the time leading up to and after the controlled buy. At no time, did officers observe the RCI and the third party make contact with anyone other than Appellee. The RCI presented officers with a white powder, which field tested positive for cocaine, and which the RCI said he had purchased from Appellee. There was sufficient police observation of the controlled buy and the participation of the unwitting third party so as to give it corroborative value.

Considering the evidence of the controlled buy under the totality of the circumstances test, which includes information establishing the RCI's veracity and reliability, and information independently

corroborating the RCI's information relating to the controlled buy, I find there was a substantial basis to conclude that probable cause existed to issue the search warrant. The District Court abused its discretion in ruling to the contrary and this case should be reversed and remanded for further proceedings. This resolution makes it unnecessary to address Proposition II and the application of the good faith exception.

I am authorized to state that Judge Hudson joins in this writing.