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Court of Appeals
Division I
State of Washington

NO. 73036-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KYLE CONNOR-SMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONALD J. PORTER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES PRESENTED

1. A trial court's finding of fact should be upheld on appeal when there is substantial evidence in the record supporting the challenged finding. The evidence is to be viewed in the light most favorable to the State. The arresting officer testified that Connor-Smith had been placed under arrest for outstanding warrants before marijuana was found in his pocket. Should the trial court's finding that the search was incident to arrest be upheld?

2. An alleged omission from an affidavit in support of a search warrant will render the warrant invalid only if the alleged omission was material and was made either deliberately or with reckless disregard for the truth. No evidence was elicited at the suppression hearing that the affiant detective had deliberately or recklessly omitted from the affidavit that there were two adults in the car when Connor-Smith was arrested. Nor was such information material to the magistrate's determination of probable cause. Should the search warrant be upheld?

3. The issuance of a search warrant is reviewed only for abuse of discretion, with great deference given to the issuing judge or magistrate. Facts that standing alone might not support probable cause can do so when viewed together with other facts. Here, numerous facts were included in the affidavit that, taken as a whole with commonsense inferences,

establish probable cause. Did the issuing judge properly exercise his discretion by finding probable cause and issuing the search warrant?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Kyle Connor-Smith was charged in juvenile court with one count of unlawful possession of a firearm in the second degree. CP 1, 7-8. In a pretrial suppression hearing Connor-Smith moved to exclude the firearm, arguing that there was insufficient probable cause to support the initial warrant to search the car for controlled substances. CP 9-21. The trial court denied the motion to suppress, finding that there was probable cause to support the search warrant. CP 88. In doing so, the trial court found that the small amount of marijuana on Connor-Smith was seized during a search incident to his arrest for the outstanding warrants. CP 86. Subsequently, the trial court found Connor-Smith guilty as charged and imposed a manifest injustice sentence of 42-52 weeks, but suspended the imposition of the sentence for 12 months. CP 90-92.

2. SUBSTANTIVE FACTS.

On the day of Connor-Smith's arrest, Detective Joseph Eshom and his partner Deputy Aaron Thompson were in an unmarked minivan with

concealed emergency lights. RP¹ 62. Eshom “ran the plate” of a Lexus and immediately recognized the car to be the same vehicle with which he had been involved in a pursuit eight months earlier. RP 63. Connor-Smith had been the driver at the time of the earlier pursuit and had been arrested by Eshom. RP 64. Eshom and Thompson watched the Lexus turn into a minimart parking lot but did not at that point pursue it. RP 66. Eshom checked the database to determine whether Connor-Smith had any active felony arrest warrants. RP 66, 143. The detectives then made a U-turn and parked and watched the Lexus from across the street. RP 66-67. They saw Connor-Smith walk over and briefly make contact with occupants in another car. RP 67. He stood at the passenger side of the car for about 30 seconds but was not seen exchanging anything with the occupants of the car. RP 143. Connor-Smith then walked back to his own car and drove away. RP 67. At about the same time that Connor-Smith drove out of the parking lot the officers learned that he had three active felony warrants. RP 68-69, 144.

The officers followed along behind the Lexus. Based on what the officers had seen occur between Connor-Smith and the occupants of the white car there was not enough evidence to initiate a “narcotics stop.”

¹ The verbatim report of proceedings comprises four volumes that are consecutively paginated. Citations to the verbatim report of proceedings in this brief will be in this format: RP ____.

RP 145. Although Detective Eshom suspected that Connor-Smith had been involved in a drug deal in the minimart parking lot, the “main basis” that he wanted to stop the Lexus was to arrest Connor-Smith for the active warrants. RP 69. As Eshom testified: “we had definitely a reason for an arrest on the felony warrants.” RP 69. Deputy Thompson testified that the “basis for pulling him over” was “to see if the warrant subject was in fact driving.” RP 145.

About a block down the street from the minimart the Lexus pulled into an apartment complex. RP 70. The detectives in the minivan pulled in behind the Lexus and activated their lights. RP 70. Eshom and Thompson saw Connor-Smith look back at them, then push himself up and dig around at something at his waist before lunging forward as if he were putting something under the seat. RP 72, 146. Connor-Smith flung open his door and Eshom believed he was “getting ready to run,” so Eshom and Thompson quickly got out of the minivan and drew their guns. RP 72-73, 146-47. Two of the passenger doors were flung open and passengers (in addition to the driver Connor-Smith) were quickly getting out of the car. RP 71, 73.

Eshom held the passengers at gunpoint while Thompson handcuffed Connor-Smith. RP 75. Thompson asked his name and Connor-Smith stated: “There’s nothing – there is nothing in my car.”

RP 147-48. When Thompson asked again for his name, Connor-Smith gave a false name. RP 149. Eshom then came over and told Thompson that the subject's name was Connor-Smith. RP 149. Thompson searched Connor-Smith and found a small baggie of marijuana in his pocket. RP 150. Thompson testified that the search was done "incident to his arrest." RP 150. Eshom testified: "We confirmed Kyle's warrants and he went to jail for the warrants...." RP 75. While Connor-Smith was cuffed but before he was transported the officers smelled the odor of fresh marijuana coming from the Lexus, even after all occupants were removed. RP 76-79, 150-51.

Shortly after having Connor-Smith's car towed and clearing the scene, Detective Eshom sought and obtained a search warrant for the car. Ex. 5 at _____. The warrant authorized the seizure of controlled substances and items associated with controlled substances. Ex. 5 at _____. While conducting the search for controlled substances, officers found a semi-automatic handgun stuffed between the driver's seat and the center console and another handgun on the rear floorboards. Ex. 6 at _____. Detective Eshom then obtained an addendum to the search warrant allowing officers to seize any firearms or ammunition. Ex. 6; Ex. 7.

C. ARGUMENT

1. THE TRIAL COURT'S FINDING THAT THE MARIJUANA FOUND ON CONNOR-SMITH WAS SEIZED DURING A SEARCH INCIDENT TO ARREST IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Connor-Smith contends that the search warrant should be held invalid because the marijuana found in his pocket, cited in the affidavit in support of the warrant, was illegally obtained during a search that exceeded the permissible scope of a Terry² stop. Connor-Smith's argument fails because there is substantial evidence in support of the trial court's finding that the marijuana was seized from Connor-Smith pursuant to a search incident to arrest.

Connor-Smith's argument rests on his challenge to the trial court's findings of fact 20 through 23. CP 85-86. In reviewing the findings of fact entered following a motion to suppress, an appellate court will review only those facts to which error has been assigned. Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); In re Riley, 76 Wn.2d 32, 33, 454 P.2d 820, cert. denied, 396 U.S. 972 (1969). Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. Hill, 123 Wn.2d at 644; State v. Graffius, 74 Wn. App. 23, 29, 871 P.2d

² Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

1115 (1994). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Hill, 13 Wn.2d at 644. Moreover, a challenge to the sufficiency of the evidence to prove a particular matter in a criminal case requires that the appellate court view the evidence “in the light most favorable to the State.” State v. Bodey, 44 Wn. App. 698, 723 P.2d 1148 (1986); State v. Frederiksen, 40 Wn. App. 749, 700 P.2d 369, review denied, 104 Wn.2d 1013 (1985).

For the purpose of determining the admissibility pursuant to CrR 3.5 of Connor-Smith’s statement that there was nothing in his car, which came immediately in response to Deputy Thompson asking his name, the trial court found that Connor-Smith was not at that time under arrest but rather was detained pursuant to Terry. Connor-Smith argues that the search that resulted in removing a baggie of marijuana from his pocket also occurred as part of the Terry stop before he was under arrest. There is no evidence to support his argument. The trial court made no finding temporally linking the statement made by Connor-Smith to the search that resulted in finding marijuana in his pocket. There was no testimony elicited from the arresting officer, Deputy Thompson, that he found the marijuana during an initial pat-down for weapons. At no time did Connor-Smith’s trial counsel ask Thompson if he had immediately

done an officer's safety frisk for weapons, and, if so, whether that was when he found the marijuana. To the contrary, Thompson testified that the search occurred up to five minutes after Connor-Smith had been detained. RP 171. Thompson also clearly testified that the marijuana was not found until Connor-Smith was arrested. RP 150. Thompson further testified that although Connor-Smith was initially handcuffed before being placed under arrest, the arrest did not occur until after the warrants were confirmed by his partner Detective Eshom. RP 163.

In support of his argument that the marijuana was found before he was arrested, Connor-Smith also asserts that "the warrants were confirmed sometime shortly before leaving the scene, some 30 minutes after the initial stop of the vehicle." Appellant's Brief at 20. There is no factual basis in the record that the warrants were confirmed 30 minutes after the car was stopped. From Detective Eshom's testimony it is clear he had no specific recollection of when Connor-Smith's warrants were confirmed, only that by policy warrants are confirmed before a subject is transported as a result of being arrested on warrants. RP 123-25. Eshom agreed that it had likely been done shortly before Connor-Smith was transported. RP 124. However, there is no testimony as to when Connor-Smith was transported. Thompson, the arresting officer, testified that he was at the scene for 30-35 minutes altogether. RP 171. However, he also testified

that some other officer had arrived and transported Connor-Smith while Thompson stayed waiting for the tow truck. RP 172. Thompson testified: "A patrol car came and transported him on his warrants, so I am not sure how long he was at the scene." RP 172. Thus, there is no evidence to refute Thompson's testimony that when Connor-Smith was searched he had already been arrested for the warrants.

The trial court's finding for CrR 3.5 purposes that the statement occurred during a Terry stop is not inconsistent with the search having been done incident to arrest. Deputy Thompson's testimony that he found the marijuana after Detective Eshom had confirmed Connor-Smith's active warrants provided substantial evidence for the trial court's finding that the search was conducted incident to arrest.

2. CONNOR-SMITH FAILED TO PROVE THAT THE AFFIANT MADE A MATERIAL OMISSION FROM THE SEARCH WARRANT AFFIDAVIT THAT WAS EITHER DELIBERATE OR MADE WITH A RECKLESS DISREGARD FOR THE TRUTH.

In his pretrial motion to suppress the guns found in the search of the car, Connor-Smith alleged a single basis in support of an evidentiary hearing into the sufficiency of the search warrant. Connor-Smith alleged that it was a material omission for the affiant, in describing having detected the odor of marijuana in the car, not to have informed the

reviewing judge that there had been two adult occupants of the car.

CP 19-20.

In determining the validity of a search warrant, review is normally limited to the facts on the face of the warrant. State v. Perez, 92 Wn. App. 1, 4, 963 P.2d 881 (1998), rev. denied, 137 Wn.2d 1035 (1999). The trial court may look beyond the face of the affidavit, however, if the defendant makes a substantial preliminary showing that the affiant deliberately, or with reckless disregard for the truth, made a false statement that was necessary to the finding of probable cause. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); State v. Garrison, 118 Wn.2d 870, 827 P. 2d 1388 (1992). The same rule applies in the case of material omissions from the affidavit. Garrison, 118 Wn.2d at 872 (1992) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

Although the trial court did not make a specific finding of fact or conclusion of law relating to Connor-Smith's assertion that the affiant's failure to inform the magistrate that there were two adults in the car was a material omission, the matter was argued at the trial court and, arguably, by upholding probable cause for the warrant the trial court rejected Connor-Smith's position. Therefore, the State will address the matter on appeal.

Connor-Smith has the burden of proving by a preponderance of the evidence that there was an intentional misrepresentation or a reckless disregard for the truth by the affiant. State v. Hashman, 46 Wn. App. 211, 729 P.2d 651 (1986), review denied, 108 Wn.2d 1021 (1987). A negligent omission, which occurs when an affiant genuinely and reasonably believes that the omitted information is irrelevant, is insufficient. State v. O'Connor, 39 Wn. App. 113, 118, 692 P.2d 208 (1984), review denied, 103 Wn.2d 1022 (1985). Here, Detective Eshom, in his affidavit, included the fact that there were two other persons in the car with Connor-Smith, but he did not include their age or specify that they were adults. Ex. 4 at _____. The fact that the detective did not include in his affidavit that the other two persons in the car were over 21 was neither ill-intentioned nor material. At the pretrial hearing Connor-Smith elicited from the affiant, Detective Eshom, only that he knew the two passengers were 21 or over and that he did not mention that to the judge who reviewed his warrant request. RP 98, 129. There was no testimony to support deliberate or reckless disregard for the truth. It is likely that Detective Eshom simply considered the fact to be irrelevant to his warrant application. He would have been correct.

Even had Connor-Smith been able to establish a deliberate or reckless disregard for the truth in omitting the information, he would still

be required to show that probable cause to issue the warrant would not have been found had the omitted information been included. State v. Gentry, 125 Wn.2d 570, 607, 888 P.2d 1105 (1995). Here, he cannot do that. Inclusion of the fact that the two other persons in the car were over 21 would not have negated probable cause. Connor-Smith argues that the odor of marijuana coming from the car was of no significance because adults may now legally possess up to 40 grams of the drug. But it remains a criminal offense for a juvenile to possess any amount of marijuana, just as it continues to be a crime for adults to possess more than 40 grams. RCW 69.50.4013; RCW 69.50.4014; RCW 69.50.360(3). Here, in addition to the smell of marijuana coming from the car, it was known by the arresting officers, including the affiant, that Connor-Smith, a juvenile, was not only the driver of the car on the occasion of his arrest, but also that he had been the driver on previous occasions. It was known that the car was registered to his mother. Connor-Smith had made furtive movements indicating he was hiding something under the driver's seat. Marijuana was found in Connor-Smith's pocket. One of the three active warrants for Connor-Smith was for VUCSA³. Ex. 4 at ____.

Based on the information provided by the affiant to the magistrate, there was probable cause that marijuana would be found in the car. Any

³ Violation of the Uniform Controlled Substances Act.

amount whatsoever that could be linked through constructive possession to Connor-Smith would constitute a felony. Any marijuana in excess of 40 grams that could be linked to any of the occupants, regardless of age, would also be a felony. Inclusion of the fact that two of the car's occupants were adults would have had no impact on the probable cause determination.

3. THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

Connor-Smith argues that certain specified factual assertions in the affidavit in support of the search warrant do not establish probable cause. The analytical approach encouraged by Connor-Smith, focusing on the factual assertions in isolation, is inappropriate. Here, by properly taking into account all the factual circumstances set forth in the affidavit and drawing all reasonable commonsense inferences therefrom, it is clear that the issuing judge did not abuse his discretion in finding probable cause.

a. Relevant Facts.

Detective Eshom's affidavit for the search warrant included the following factors in support of a finding of probable cause:

- Officers saw a vehicle known from a prior contact to be associated with Connor-Smith and known to be registered to his mother.
- Connor-Smith was seen getting out of his car and making a quick contact with occupants of another car in a parking lot in a manner the experienced detective believed to be associated with narcotics activity.
- It was determined that Connor-Smith had three felony warrants: one for unlawful possession of a firearm, one for VUCSA, and one for attempting to elude.
- When officers activated the emergency lights to initiate the stop, Connor-Smith looked over his shoulder at the officers then “appeared to be digging something from his pockets or waistband. He then leaned over forward and was doing something with his hands towards his feet or under his driver’s seat.”
- Upon the stop, Connor-Smith immediately flung the door open and quickly started to get out of the car.
- Connor-Smith was placed under arrest for the warrants.
- A small amount of marijuana was found in Connor-Smith’s pocket.
- There was a strong odor of fresh marijuana in the car even after Connor-Smith had been removed from it.

- Two other passengers were released at the scene.
- A K-9 drug detection dog indicated the presence of narcotics associated with the car.

See Ex. 4 at ____.

b. The Facts Asserted In The Affidavit, Taken As A Whole, Establish Probable Cause For The Search Warrant.

A search warrant may be issued only upon a determination of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” Id. The issuing magistrate’s determination of probable cause is reviewed for abuse of discretion and is given great deference by the reviewing court. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). All doubts are resolved in favor of the warrant’s validity. Id.

In determining probable cause, the magistrate makes a practical, commonsense decision, taking into account all the circumstances set forth in the affidavit and drawing commonsense inferences. Id. at 509-10 (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d

527 (1983)). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. State v. Garcia, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992).

Connor-Smith argues that “mere familiarity with the subject of an investigation does not provide probable cause,” and, relatedly, that Connor-Smith’s outstanding felony warrants added nothing to probable because “the State did not adduce evidence that the warrants had anything whatsoever to do with narcotics.” Nowhere in his briefing does Connor-Smith acknowledge that the affidavit in support of the search warrant specifically asserted that one of the felony warrants was for VUCSA. Ex. 4 at _____. This fact renders Connor-Smith’s argument and citations to authority inapposite. When a suspect’s prior criminal involvement is of the same general nature as the crime for which evidence is being sought, as in the case at bar, then that information is “not only proper but helpful in establishing probable cause.” State v. Clark, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001) (citing Greenstreet v. County of San Bernardino, 41 F.3d 1306, 1309 (9th Cir. 1994)).

Connor-Smith also argues that “stopping briefly in a ‘high crime area’ fails to furnish probable cause of a crime.” In his affidavit in support of the search warrant, referring to Connor-Smith having stopped for a short period in the parking lot of a “mini market,” Detective Eshom stated:

[Connor-Smith] walked over to a white Lexus and made contact with the passenger side of the white Lexus for a few seconds and then got back in his green Lexus. Both vehicles then left the parking lot and went in opposite directions on Renton Ave. S. ... This quick contact in the parking lot between both vehicles is consistent with narcotics activity.

Ex. 4 at _____. The State is certainly willing to concede that this snippet of information would not, standing alone, establish probable cause to search the car for controlled substances. But such is not the test. Garcia, 63 Wn. App. at 875. The test is whether probable cause is established by taking into account all the circumstances set forth in the affidavit and drawing commonsense inferences. Maddox, 152 Wn.2d at 509. The authorities cited by Connor-Smith do not address the value of “high crime area” evidence as a factor among others in supporting probable cause for a search warrant. In State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980), the court held that the fact that a car had been illegally parked in a high crime area and then had begun pulling away when officers approached did not establish a reasonable suspicion of criminal activity justifying an investigatory stop of the car. Similarly, in State v. Doughty, 170 Wn.2d 57, 65, 239 P.3d 573 (2010), the court held that the defendant’s two-minute visit at 3:20 a.m. to a “known drug house” did not justify a subsequent Terry stop. The court here had more.

Connor-Smith takes the same misguided approach by arguing that “appearing to hide items from the police does not establish probable cause that a crime has been committed.” State v. Gatewood, 163 Wn.2d 534, 182 P.3d 426 (2008), cited by Connor-Smith, did not assess the value of a person’s apparent attempt to hide items as one factor among several in a warrant affidavit. Rather, Gatewood simply held that such evidence alone did not justify a Terry stop. Id. at 539.

Connor-Smith also claims that “the dog sniff adds nothing to the probable cause analysis and the trial court illogically and erroneously concluded otherwise.” This Court should refuse to address this claim as Connor-Smith failed to assign error to Conclusion of Law No. 9, which states:

In addition to the above-mentioned factors, probable cause to search the respondent’s vehicle was enhanced by K-9 jade’s positive reaction to the presence of narcotics.

CP 88. Connor-Smith assigned error only to Conclusion of Law No. 8, in which the trial court specified the factors that “provided sufficient probable cause to search the respondent’s vehicle.” CP 88. However, if this Court addresses Connor-Smith’s claim, his argument should be rejected on the same basis as his other attempts to isolate specific facts rather than to engage in a commonsense assessment of the entire affidavit as required by law. That a trained K-9 alerted to the presence of narcotics

was certainly relevant and worthy of inclusion in the warrant affidavit regardless of whether, standing alone, it would be sufficient to establish probable cause.

In the instant case, taking into account all the abundant facts and circumstances set forth by Detective Eshom in his affidavit in support of the search warrant, and drawing commonsense inferences therefrom as required by law, it is clear that the issuing magistrate did not abuse his discretion in finding the existence of probable cause.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Connor-Smith's conviction.

DATED this 14 day of October, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DONALD J. PORTER, WSBA #20164
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Kevin A. March, containing a copy of the Brief of Respondent, in STATE V. KEVIN CONNOR-SMITH, Cause No. 73036-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Done in Seattle, Washington

10-14-15
Date : Oct. 14, 2015