IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1997 SESSION

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9609-CC-00345**
Appellant,	)	
	)	**ANDERSON COUNTY**
VS.	)	
	)	**HON. JAMES B. SCOTT, JR., JUDGE**
JOE ED YORK, SHEILA YORK, ELLEN YORK, GEORGE YORK, and LISA PATTERSON,	)	
	)	(State appeal)
	)	
Appellees.	)	

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendants[1] were indicted in January 1996 for possession of marijuana with intent to sell. They filed a motion to suppress all of the evidence discovered through a search warrant. After a hearing, the trial court granted the defendants' motion. The State now appeals. After a review of the record, we find no merit to the State's appeal and affirm the judgment of the court below.

On November 10, 1995, Jeff Davis, Chief of Operations of the 7th Judicial District Drug Task Force, submitted an affidavit seeking to obtain a search warrant for a home located at 7423 New River Highway in Anderson County. The home belonged to defendant Joe Ed York. In the affidavit, Davis said he had received information from two people. The affidavit stated that on the morning of November 10, 1995, a "concerned citizen" (hereinafter referred to as CC-1) telephoned and said that within the past thirty-six hours he had been at the home of Joe Ed York and had observed marijuana in the home's basement. Davis stated that CC-1 was acting as a "concerned citizen, who feared for his/her safety to the extent that he/she refused to identify himself/herself . . . ."

Prior to receiving this call, Davis had spoken to another source. In his affidavit, Davis stated that on November 1, 1995, he had spoken to a "confidential informant" (hereinafter referred to as CC-2)[2] who said he had purchased marijuana from Joe Ed York in the past and had observed and purchased some marijuana at the home on October 29,1995. Davis and CC-2 then drove to the New River area and CC-2 identified the house belonging to Joe Ed York. In the affidavit, the house was described

[1]Ellen York, one of the original five defendants, died prior to the filing of the State's appeal. According to the defendants' brief, an order granting the State's motion to dismiss the charges against her was entered on November 8, 1996.

[2]This is the manner in which the informant was identified in the affidavit.

as a white wood frame residence with a small cinder block wall in front of the home.

Based upon the above information, a search warrant was issued for the home of Joe Ed York. When officers executed the warrant on November 11, 1995, the following was seized:

> Plastic garbage bag containing marijuana,
> Five boxes of Gladlock storage/sandwich bags,
> Plastic baggie containing marijuana buds,
> Plastic baggies containing marijuana leaves, and
> Plastic baggie containing small marijuana bud and seeds.

After a hearing, the trial court granted the defendants' motion to suppress all the above evidence. In granting the motion, the trial court included findings of fact as well as conclusions of law. The findings of a trial judge on factual issues in a suppression hearing will be upheld unless the evidence preponderates otherwise. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). In this case, we find no reason to disturb the trial court's findings. Further, we agree with the trial court's application of law to those findings.

In its conclusions of law, the trial court found that the affidavit in support of the search warrant was deficient. Initially, we note that an affidavit is an indispensable prerequisite to the issuance of any search warrant. T.C.A. § 40-6-103; State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992). The affidavit must establish probable cause. T.C.A. § 40-6-104; Tenn. R. Crim. P. 41(c). Thus, "probable cause to support the issuance of the warrant must appear in the affidavit." Moon, 841 S.W.2d at 338. In this case, the trial court found a lack of probable cause because the information in the affidavit given by CC-1 failed to satisfy the veracity prong of the two-prong test adopted in State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989)(relying upon Spinelli v. United States, 393 U.S. 410 (1969), and Aguilar v. Texas, 378 U.S. 108 (1964)). The court specifically found that the "concerned citizen" language was conclusory and legally deficient. We agree with this determination.

The State first argues that the Aguilar-Spinelli test of Jacumin should not have been applied to both informants listed in the affidavit. While CC-2 was clearly a confidential informant to whom the test applied, the State argues that the test should not have been applied to CC-1 who was simply a citizen informant. The State argues that the reliability of CC-1 should have been evaluated in accordance with the principles in State v. Melson, 638 S.W.2d 342 (Tenn. 1982) and its progeny.

A clear distinction has been drawn between the citizen informant and the typical criminal informant or "tipster." Melson, 638 S.W.2d at 354. Information gathered from a citizen informant known to the affiant is presumed to be reliable, thus the prosecution is not required to establish either the credibility or reliability of the informant. State v. Cauley, 863 S.W.2d 411, 417 (Tenn. 1993), *citing* Melson, 638 S.W.2d at 354-56. However, where the citizen informant is unknown to the affiant, "the reliability of the source and the information must be judged from all the circumstances and from the entirety of the affidavit." Cauley, 863 S.W.2d at 417 (citation omitted).

On the other hand, information provided by a confidential informant is subject to the more stringent test of Aguilar-Spinelli. Specifically, the affidavit requesting the search warrant must show (1)the basis for the informant's knowledge (the "basis of knowledge prong") and (2) either a basis establishing the informant's credibility or a basis establishing that the informant's information is reliable (the "veracity prong"). State v. Ballard, 836 S.W.2d 560, 562 (Tenn. 1992).

In this case, the trial court viewed CC-1 as a confidential informant and applied the Aguilar-Spinelli test. CC-1 had been described in the affidavit as a "concerned citizen" who, out of fear for his or her safety, did not reveal his or her identity to the investigator. No other facts are included as to the identity of this informant. This Court has stated before:

> It is incumbent, we think, upon whoever seeks a search warrant to include in the affidavit whether the informational source, named or confidential, qualifies as a citizen informant. Otherwise, the issuing magistrate would not know which standard, Jacumin or Melson, to apply. Whether the affidavit describes the status of the source directly, by implication, or by inference, is immaterial; it must, however, be apparent before the less stringent Melson standard can be used to test the validity of the warrant.

State v. Smith, 867 S.W.2d 343, 348 (Tenn. Crim. App. 1993).

This affidavit, like the one in Smith, contains nothing to indicate that CC-1 was merely a witness. The Smith affidavit identified the informant by name, but only described him as "a reliable person." 867 S.W.2d at 345. In comparison, the affidavit in Melson identified the sources of information, their relationship to the victim, and their status as witnesses of pertinent events. Smith, 867 S.W.2d at 348. The Smith affidavit and the one in the case sub judice lack this information. Because the informant's status in Smith was not more adequately identified, his credibility was judged under the Jacumin standard. Thus, we conclude that CC-1's credibility must be judged likewise.

As noted above, the trial court found that CC-1 did not meet the second, or veracity, prong of the test in Jacumin. We agree with this conclusion. "The veracity prong may be satisfied by establishing the informant's inherent credibility or by establishing the reliability of the information." State v. Stephen Udzinski, Jr., No. 01C01-9212-CC-00380, Dickson County (Tenn. Crim. App. filed Nov. 18, 1993, at Nashville). A conclusory allegation that the informant is reliable is insufficient to satisfy this prong. Spinelli, 393 U.S. at 416-18. In the present case, the affiant only states that the informant is a "concerned citizen." Nothing in the affidavit shows the informant's credibility or the reliability of his information. The affiant did not know CC-1 and thus, he had no means of ascertaining whether CC-1 was credible or whether CC-1's information was reliable. For these reasons, we conclude that CC-1 fails to satisfy the requirements of the Jacumin and Aguilar-Spinelli test.

Reaching this conclusion, however, does not end our inquiry. Unlike the trial court, we find it necessary to also evaluate the other informant, CC-2, to determine whether his information was sufficient to support the issuance of the search warrant. Again, we find that the veracity prong of Jacumin was not satisfied. CC-2 was clearly identified as a "confidential informant," therefore, there is no question that Jacumin applies.

In order to satisfy the veracity prong, the affiant must relate the underlying circumstances which lead to the conclusion that the informant is credible or his information is reliable. With a confidential informant, this is generally shown by the informant's having previously provided relevant information to police officers that was proven to be reliable. Moon, 841 S.W.2d at 339. An informant's "track record" is certainly helpful in inferring that the informant is reliable. However, in this case, as in Moon, the affidavit made no claim that the informant had any history of providing accurate and reliable information to police officers. "Thus, there is no circumstance provided from which the magistrate could infer that the informant's information was reliable because he was a credible person." Moon, 841 S.W.2d at 339. We also reject the State's argument that the information in the affidavit is reliable because CC-2 gave information against his penal interest. The affidavit does not demonstrate how such a statement relates to the informant's credibility or to the reliability of his information. Thus, we conclude that the fact that CC-2 made a statement against his penal interests carries no weight toward enhancing the reliability of his information. See Moon, 841 S.W.2d at 339-40. We further note that CC-2's accompanying Officer Davis to the home of Joe Ed York is not sufficient corroboration of CC-2's information. Corroboration of a minor element of the story, such as the location of a home, is insufficient to establish an informant's reliability. See Moon, 841 S.W.2d at 341.

We also reject the State's argument that when viewing the affidavit as a

whole and considering the information given by CC-1 and CC-2 together, there is sufficient probable cause for the search warrant. Having concluded that both informants fail to satisfy the Jacumin requirements, we find no merit to this argument. These two unreliable sources cannot be put together to create sufficient reliability.

For the foregoing reasons, we affirm the trial court's determination that the search warrant was not based upon probable cause.

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JOHN H. PEAY, Judge

CONCUR:

_____

PAUL G. SUMMERS, Judge

_____

CORNELIA A. CLARK, Judge

IN THE COURT OF CRIMINAL APPEALS
EASTERN SECTION AT KNOXVILLE

STATE OF TENNESSEE,

Appellant,

VS.

JOE ED YORK, SHEILA YORK, ELLEN YORK, GEORGE YORK, and LISA PATTERSON,

C.C.A. NO. 03C01-9609-CC-00345

Anderson COUNTY

NO. 96CR018A,B,C,DF Below

Offense:
Possession of marijuana with intent to sell

Appellees.

Affirmed and Remanded

JUDGMENT

Came the appellant, the State of Tennessee, by the Attorney General, and the appellees by counsel, and this case was heard on the record on appeal from the Circuit Court of Anderson County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is affirmed, and the case is remanded to the Circuit Court of Anderson County for execution of the judgment of that court and for collection of costs accrued below.

Costs of appeal will be paid by the appellant, the State of Tennessee, for which let execution issue.