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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR09-1146

TERRY MOSS APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered September 22, 2010 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR 2008-508] HONORABLE J. MICHAEL FITZHUGH, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

Terry Moss appeals the revocation of his suspended sentence. The revocation resulted in a one-year sentence in the Sebastian County Detention Center. On appeal, he argues that the trial court erred in denying his motion to suppress evidence seized during the execution of a May 14, 2009 search warrant. When the police executed the warrant, they found seventeen pounds of marijuana, numerous other controlled substances, firearms, and a quantity of cash. We affirm.

On August 29, 2008, Moss pleaded guilty to misdemeanor possession of marijuana. He received a one-year suspended sentence. On May 21, 2009, the State petitioned to revoke, alleging that on May 14, 2009, he committed the offenses of possession of ecstacy with intent to deliver, possession of marijuana with intent to deliver, possession of drug paraphernalia and simultaneous possession of drugs and firearms. The petition was

subsequently amended to add additional substantive charges of possession of marijuana and driving with a suspended license that occurred on June 10, 2009, and an allegation that Moss committed the offense of fleeing on July 15, 2009. The amended petition also corrected the types of controlled substances that Moss possessed on May 14, 2009. At an August 19, 2009 hearing, the trial court took up both the revocation of Moss's suspended sentence and his motion to suppress evidence seized on May 14. The State announced that it did not intend to go forward on the allegations of criminal activity that occurred on June 10, 2009.

At the hearing, Moss acknowledged that the exclusionary rule ordinarily does not apply to revocation proceedings, absent "bad faith" on the part of the police. Moss specifically defined "bad faith" as "illegal acts of the police . . . directed specifically at a probationer or where they shocked the conscience." Accordingly, Moss focused on proving that the police acted in bad faith.

In applying for the search warrant, Allan Marx, a sixteen-year veteran of the Sebastian County Sheriff's Department, in pertinent part made the following statements in his affidavit:

> On May 14, 2009, I and other officers with the Drug Task Force were conducting surveillance of 140 North 49th Street in Fort Smith, Arkansas. We had previously received information from a confidential informant that the resident of 140 North 49th Street, Terry Moss, was selling large quantities of marijuana and ecstasy out of the residence. While conducting surveillance, I observed a dark-colored SUV with Texas license plate tag number FNK175 leaving 140 North 49th Street in Fort Smith, Arkansas. The vehicle was registered to Laquita Thomas. A traffic stop of that vehicle was conducted at approximately 1:16 p.m. today. Laquita Thomas was driving and gave consent to search the vehicle. A search of the vehicle turned up a quantity of crack cocaine underneath the center console. The substance field-tested positive for crack cocaine.
>
> Laquita Thomas was arrested and transported to the Sebastian County Sheriff's

> Office. There Laquita Thomas gave a mirandized statement against her penal interest that she was at 140 North 49th Street to meet with Terry Moss. Laquita Thomas reported that just prior to her arrest at 140 North 49th Street she smoked marijuana with Terry Moss and that Terry Moss had additional quantities of marijuana in the residence. Terry Moss has previously been convicted of Possession of Marijuana in CR-2008-508 and is currently on a suspended imposition of sentence.
>
> Based on my training and experience, persons engaged in the sale and distribution of controlled substances, as reported by the confidential informant, commonly keep records of drug transactions. Said records are kept in paper ledgers, notebooks, as well in digital forms on computer hard drives and removable storage devices.
>
> Based upon the evidence I have outlined in this Affidavit, I have probable cause to search 140 North 49th Street in Fort Smith, Arkansas, for marijuana, items commonly used to package and ingest marijuana, and items of documentary evidence.

Moss attacked the veracity of Marx's factual assertions, largely by comparing them with the purported source of the information, the recorded statement that Laquita Thomas gave to police. Moss argued that the police intentionally misled the judge who signed the warrant by the assertion that Thomas and Moss smoked marijuana "just prior to her arrest," because in Thomas's recorded statement she claimed that she smoked a "blunt" with Moss shortly after her arrival at Moss's residence at "maybe ten" a.m. Likewise, Moss argued that the assertion that Moss "had additional quantities of marijuana in the residence," was intentionally misleading because Thomas merely stated that the marijuana she smoked with Moss came "out of a little sack" and "every time I come up he got a little sack," but specifically denied having observed other marijuana or possible sales of the drug at the residence. Further, citing *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001), Moss also asserted that the reference to the confidential informant was legally infirm because the affidavit listed no basis for reliability, and the reference to Moss's prior criminal history was to be afforded no weight. Finally, Moss

asserted that the State violated Rule 13.3(c) of the Arkansas Rules of Criminal Procedure because the police failed to give a copy of the warrant to Amber Engel, who was present in the residence when the warrant was executed.

The trial court denied the motion to suppress. It specifically found that the failure to give Engel a copy of the warrant was of no consequence because it did not prejudice Moss; Thomas's statement that she smoked marijuana with Moss within three hours of her arrest was "within close proximity" of the time; and Thomas's statement supported the assertion that there were additional quantities of marijuana at the residence. Further, the trial court found that *Yancey* was distinguishable from the case at bar and that there was no bad faith on the part of the police. The trial court subsequently found that Moss violated the terms and conditions of his suspended sentence by possessing marijuana and other contraband. Moss timely appealed.

When we review the denial of a motion to suppress evidence, we make an independent examination based on the totality of the circumstances and reverse the circuit court's decision only if it was clearly against the preponderance of the evidence. *King v. State*, 314 Ark. 205, 862 S.W.2d 229 (1993). To uphold the validity of an affidavit, it is not necessary that the affidavit be completely without inaccuracy so long as the inaccuracies are relatively minor when viewed in the context of the totality of the circumstances, including the affidavit taken as a whole and the weight of the testimony of the participants who procured and executed the search warrant. *Id.* As Moss conceded at the suppression hearing,

in general, the exclusionary rule does not apply in revocation proceedings, absent some proof on the part of the defendant that he or she was entitled to some exception. *McGhee v. State*, 25 Ark. App. 132, 752 S.W.2d 303 (1988).

On appeal, Moss argues, as he did to the trial court, that the trial court erred in denying his motion to suppress the evidence obtained on May 14, 2009, because the police manifested bad faith in obtaining the warrant. As he did below, he once again raises on appeal the deficiencies with regard to the warrant. We conclude that the trial court did not err in finding that Moss failed to prove that the police acted in bad faith and in refusing to suppress the evidence.

First, we note that under *Yancey*, the reference to Moss's prior conviction for possession of a controlled substance was entitled to little weight. We decline, however, to hold that its inclusion in the affidavit was proof of police misconduct that rose to the level of bad faith. Such information is not per se invalid when included on a search-warrant affidavit, but rather entitled to weight only when there is a "sufficient nexus" between the prior illegal activity and the place to be searched. *Haynes v. State*, 83 Ark. App. 314, 128 S.W.3d 33 (2003). Accordingly, it is neither entitled to weight in the probable cause determination nor proof of police misconduct.

Next, we consider what Moss calls the "most outrageous act" committed by the affiant, Detective Marx, the making of a "false statement in the affidavit." By this, he is referring to the averment that "Laquita Thomas reported that just prior to her arrest while at

140 North 49th Street she smoked marijuana with Terry Moss and that Terry Moss had additional quantities of marijuana in the residence." As noted previously, Thomas reported smoking marijuana approximately three hours before her arrest. We hold that it was sufficiently close in time to make the trial court's finding that statement factually valid, not clearly against the preponderance of the evidence. Likewise, with regard to the second statement in question, that there were "additional quantities of marijuana in the residence," we note that Thomas did not report that Moss's "little sack" was emptied when they smoked a marijuana-filled cigar. Moreover, her estimate of how much marijuana was in the "little sack" was twice as much as she reported consuming with Moss. Additionally, Thomas stated that, based on several visits, she never knew Moss to be without an ample supply of marijuana. We hold that these facts reasonably support the inferences about which Moss now complains.

With regard to the lack of indicia of reliability pertaining to the confidential informant, we hold that it is of no consequence because probable cause was established through the statement provided by Thomas. Likewise, with regard to papers, ledgers, notebooks, computer hard drives and paraphernalia, Moss's contention that the affidavit does not provide a "substantial basis that the items in the warrant would be at the residence" is of no moment. Moss's revocation was based on his possession of seventeen pounds of marijuana. While, at worst, the State may have over-relied on Detective Marx's experience in listing documentary evidence as part of the things to be seized, it did not prejudice Moss, and more

importantly, it did not prove police misconduct.

Affirmed.

VAUGHT, C.J., and PITTMAN, J., agree.