David AKINS and Betty AKINS
v. STATE of Arkansas

CR 78-114 572 S.W. 2d 140

Opinion delivered October 16, 1978
(Division I)

1. CRIMINAL LAW — SEARCH WARRANT, AFFIDAVIT FOR — CONTROLLING RULE IN DETERMINING SUFFICIENCY. — Rule 13.1 (b), Rules of Crim. Proc. (1976), which is the controlling rule in determining whether an affidavit for search warrant is sufficient, provides that if an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness must set forth particular facts bearing on the informant's reliability, *i.e.*, the affiant must state more than a mere conclusion and disclose enough information to show that the informant is worthy of belief.
2. SEARCH & SEIZURE — AFFIDAVIT FOR SEARCH WARRANT — AFFIDAVIT STATING CONCLUSION FATALLY DEFECTIVE. — An affidavit for search warrant which states that the affiant knows his informant is reliable because he has been reliable in the past is a mere conclusion and is fatally defective.
3. CRIMINAL LAW — INSTRUCTIONS — INSTRUCTION ON QUANTITY OF MARIHUANA POSSESSED AS EVIDENCE IN DETERMINING INTENT, PROPRIETY OF. — An instruction to the jury that the quantity of marihuana possessed is evidence to be considered along with all the other facts and circumstances in the case in determining the intent with which the marihuana was possessed is proper. [Ark. Stat. Ann. § 41-110 (5) (b).]

Appeal from Crawford Circuit Court, *David Partain*, Judge; reversed.

Sam Hugh Park, for appellants.

Bill Clinton, Atty. Gen., by: *Jesse L. Kearney*, Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. In this prosecution for possession of marihuana with intent to deliver, the State was allowed to introduce evidence obtained pursuant to a search warrant. The officer's affidavit for the search warrant contained only this statement about the reliability of his informant: "An informant proved reliable in the past to af-

fiant told affiant that he had personally viewed the Marijuana upon the property above described."

The statement is fatally defective. Our controlling Rule, which is based upon many decisions, provides: "If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability . . . " Rules of Criminal Procedure, Rule 13.1 (b) (1976). The affiant must state more than a mere conclusion and disclose enough information to show that the informant is worthy of belief. *Rowland* v. *State,* 262 Ark. 783, 561 S.W. 2d 304 (1978). Here the affiant in substance said: "I know my informant is reliable, because he has been reliable in the past." That statement is a mere conclusion, providing the magistrate with no facts bearing upon the reliability of the unnamed informant. Thus the magistrate was at best depending upon the reliability of the affiant, not upon that of the informant. Where hearsay is an essential basis for the magistrate's conclusion, that short cut is not permissible.

The court correctly instructed the jury that the quantity of marihuana possessed was evidence to be considered along with all the other facts and circumstances in the cases in determining the intent with which the marihuana was possessed. Ark. Stat. Ann. § 41-110 (5) (b) and Commentary (Repl. 1977).

Reversed and remanded.

We agree. FOGLEMAN, HOLT, and HOWARD, JJ.