

IN THE COURT OF CRIMINAL APPEALS AT NASHVILLE, TENNESSEE

STATE OF TENNESSEE,

Plaintiff-Appellee

vs.

EVELYN BOSTIC,

Defendant-Appellant

C. C. A. No. M2000-03011-CCA-R3-CD

Rutherford County Case No. 48518A

**ON APPEAL PURSUANT TO RESERVATION
OF A CERTIFIED QUESTION OF LAW
FROM THE JUDGMENT OF THE CRIMINAL COURT
OF RUTHERFORD COUNTY**

BRIEF OF APPELLANT

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NO ORAL ARGUMENT REQUESTED

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ISSUE PRESENTED FOR REVIEW

Whether the search warrant affidavit established probable cause, or more specifically, whether there is a basis of knowledge for the informant's assertions and whether the affidavit established a sufficient nexus between the evidence sought and the premises to be searched.

INTRODUCTION

MAY IT PLEASE THE COURT:

This is an appeal pursuant to Rule 37 of Tennessee Rules of Appellate Procedure challenging Defendant's conviction for possession of more than 26 grams of cocaine with intent to sell, for which she received a six year sentence. Defendant is not in custody.

The abbreviations (T.R.) and (T.E.) will hereinafter be used to indicate references to the Technical Record and Trial Transcript of Evidence, respectively.

The appellant, EVELYN BOSTIC, will be referred to as the defendant. The appellee, the State of Tennessee, will be referred to as the State.

Appellant will move to supplement the record with the search warrant and affidavit which were made an exhibit to testimony at the hearing on the motion to suppress.

STATEMENT OF THE CASE

On November 23, 1998, the Rutherford County Grand Jury indicted Appellant Evelyn Bostic for possession of more than 26 grams of cocaine with intent to sell (T.R. p. 4).

Defendant filed a motion to suppress (T.R. p. 5), which was denied after a hearing on July 21, 2000. (T.R. p. 11).

On August 16, 2000, the defendant pleaded guilty and received a six-year sentence. (T.R. p. 13). The judgment form recited the following language in the “Special Conditions” box:

Defendant Evelyn Bostic, pursuant to T.R.Crim.P. (sic) Rule 37(b)(2)(i), by agreement and consent of the Court and the District Attorney, expressly reserves a certified issue of law which is dispositive of the case, that is, whether the affidavit supporting the search warrant for the premises at 1 Imperial Boulevard, Smyrna, Tennessee executed on September, 2 1999, is facially valid, or more specifically, whether it establishes probable cause.

(T.R. p. 13).

On August 18, 2000, Defendant petitioned the Court to amend the judgement to include the following language in the “special conditions” box on the judgment form:

Pursuant to Rule 37, T.R.A.P., Defendant Bostic is entering a plea reserving the right to appeal a certified question of law which is

dispositive of the case. The certified question is expressly reserved as part of the plea agreement and the State and Trial Judge consent to the reservation and agree that the question is dispositive. The question is: whether the search warrant affidavit establishes probable cause, or more specifically, whether there is a basis of knowledge for the informant's assertions and whether the affidavit established a sufficient nexus between the evidence sought and the premises to be searched.

(T.R. p. 22).

The amended judgment with the requested language was signed by the District Attorney, defense counsel and the trial judge on November 27, 2000 and entered that same day. (T.R. p. 22).

Appellant filed a timely notice of appeal. (T.R. p. 22).

STATEMENT OF THE FACTS

(Please see Appendix or supplemental record for search warrant and supporting affidavit.)

ARGUMENT

A search warrant for a particular place must be supported by affidavit establishing probable cause to believe that the evidence sought is located in that particular place. In *State v. Longstreet*, 619 S.W.2d 97 (Tenn.1981), the Supreme Court stated that "facts providing a **nexus** between the crime and the [place] to be searched are a critical element that must be included in the affidavit." *State v. Longstreet*, 619 S.W.2d at 99. That "nexus between the place to be searched and the items to be seized may be established by the type of crime, the nature of the items, and the normal inferences where a criminal would hide the evidence." *State v. Smith*, 868 S.W.2d 561, 572 (Tenn. 1993). These factors, and any inferences to be drawn, however, must be based on facts set forth in the affidavit. *Id.* at 572. Without sufficient nexus, probable cause is absent and a search warrant is defective.

Our appellate courts have emphasized the **quantity** of drugs cited in an affidavit. In *State v. Lewis*, the court specifically noted the defendant claimed she was "well stocked" and held the affidavit established the required nexus between the controlled substances and defendant's residence. *State v. Lewis*, 641 S.W.2d 517, 519-20 (Tenn. Crim. App.1982). In the present case, affiant cites only one instance of criminal activity, a one-time sale of an unspecified quantity of drugs from an address in another county.

Moreover, an affidavit must contain information which will allow a magistrate to determine whether the facts are too **stale** to establish probable cause at the time issuance of the warrant is sought. *Longstreet* at 99. In determining whether

information in an affidavit is stale, “the issuing magistrate should consider whether the criminal activity under investigation was an isolated event or of a protracted and continuous nature” *State v. Meeks*, 876 S.W.2d 121, 124-25 (Tenn.Crim.App. 1993). The confidential informant’s averment that “WALTER HOLMES STORES HIS DRUGS AND MONIES IN A RESIDENCE IN SMYRNA” is stale in that no time is stated as to when he received this information, nor as to when Walter Holmes allegedly stored the “drugs and monies.” Nor is this averment supported facts which satisfy the basis of knowledge prong required by *State v. Jacumin*, 778 S.W.2d 430, 432 (Tenn. 1989).

Moreover, the affiant cites only one instance of criminal activity, a one-time sale of an unspecified quantity of drugs from an address in Nashville, **Davidson** County, Tennessee.

State v. Jackson discusses what facts are necessary to make probable cause to search certain premises:

If the affiant makes the affidavit upon knowledge, he must disclose the facts upon which his knowledge is based, and these facts must be set out in the affidavit.

To illustrate, the affiant must state that he has recently seen intoxicating liquors in the possession of the defendant, or on the premises described; that he has seen persons coming from said premises in an intoxicated condition, or with intoxicating liquors on their person[s]; that the premises have the reputation of being a place where intoxicating liquors are stored; that he has seen persons

delivering intoxicating liquors to said premises; and such other facts as tend to constitute probable cause.

State v. Jackson, 234 S.W. 356, 358 (Tenn. 1926).

In the present case, no contraband was observed at the premises (1 Imperial Boulevard C-27). No person was seen coming from the premises in an intoxicated condition, or with contraband on their persons. There is no allegation that the premises had the reputation of being a place where contraband drugs are stored. Nor had the confidential informant seen persons delivering contraband to the premises (1 Imperial Boulevard, C-27).

There is no suggestion of continuing criminal activity. The affidavit merely alleges one possibly three-day-old isolated event involving the sale of an unknown, but presumably small amount of drugs in another county.

Defendant Bostic submits there is an insufficient nexus between the evidence sought and the premises to be searched (1 Imperial Boulevard, C-27).

CONCLUSION

For the reasons stated above, the appellant, Evelyn Bostic, respectfully requests that this Court reverse her conviction and dismiss this case.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a true and exact copy of the foregoing has been mailed, postage prepaid, to Paul Summers, State Attorney General, Office of Tennessee Attorney General, 500 Charlotte Avenue, Nashville, TN 37243-0497, on this the _____ day of _____, 2001.

Kenneth Quillen