

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93562

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

YANKO MANSARAY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-491214

BEFORE: Blackmon, P.J., Boyle J., and Cooney, J.

RELEASED AND JOURNALIZED: October 21, 2010

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Yanko Mansaray appeals his convictions for drug possession and possession of criminal tools and assigns the following errors for our review:

“I. The evidence obtained from Mansaray’s house should have been suppressed as having been obtained in violation of the Fourth Amendment and Article I, Section 10 of the Ohio Constitution.”

“II. There was insufficient evidence that Mr. Mansaray possessed 100 times the bulk amount of MDMA; as a result, his conviction in count one is only a fifth degree felony.”

“III. The trial court erred by refusing to require attorney Ferreri to appear as a witness at trial.”

“IV. The trial court erred in joining the instant case with CR- 486992.”

“V. Mr. Mansaray was denied the effective assistance of counsel.”

{¶ 2} Having reviewed the record and pertinent law, we reverse Mansaray’s convictions and remand for further proceedings consistent with this opinion. The apposite facts follow.

Facts

{¶ 3} Mansaray was indicted in two separate cases. Case No. CR-486992 and CR-491214. This appeal only addresses CR-491214.

{¶ 4} Mansaray was indicted for one count each for drug trafficking, possession of drugs, possession of criminal tools, and having a weapon while under disability. The counts for drug trafficking and possession of drugs had major drug offender and firearm specifications attached. The charges arose from the discovery of large quantities of ecstasy pills in Mansaray’s home by U.S. Marshals while they attempted to execute an arrest warrant on another person.

{¶ 5} Prior to trial, defense counsel filed a motion to suppress the drugs and guns found in Mansaray's home. After conducting a hearing, the trial court denied the motion, and the matter proceeded to a jury trial. The jury found Mansaray guilty of drug possession and the possession of criminal tools, but not guilty of drug trafficking. In a bifurcated hearing, the trial court found Mansaray guilty of having a weapon while under disability. The trial court sentenced Mansaray to 11 years in prison.

Hearing on the Motion to Suppress

{¶ 6} Following a lengthy federal drug trafficking investigation, arrest warrants were issued on December 6, 2006 for 23 individuals involved in a drug ring that included Rodney Williams. Members of the U.S. Marshal Service were responsible for locating and arresting the individuals. Williams's arrest warrant did not designate an address because Williams's whereabouts were unknown.

{¶ 7} Deputy U.S. Marshal Mark Herbert testified at the suppression hearing regarding how the officers determined Williams's location. According to Herbert, on December 7, 2006, the marshals were told by confidential informants that Williams would be involved in a drug transaction at a certain location in a certain car. The officers proceeded to the location, but Rodney Williams fled when they approached. Williams jumped into the

running car and escaped. He was not apprehended that day, but his cell phone was recovered.

{¶ 8} Within the hour of losing his cell phone, Williams called the confidential informants using a new cell phone number. The informants advised the marshals of the new number and also told them that Williams “hung out with Yanko” and that “Williams would be with Yanko.” At that time, the officers did not have Yanko’s last name. However, a trace of the cell phone number indicated the phone belonged to Yanko Mansaray. The officers contacted Mansaray’s probation officer, who gave them Mansaray’s address at 3981 East 66th Street in Cleveland, Ohio. Based on the information given to them and tracking the location of the cell phone usage, the marshals were confident that Williams could be found at Mansaray’s home. Because the officers knew that Williams sold drugs all night long, they planned to execute the arrest warrant at Mansaray’s residence in the morning, when Williams would be asleep.

{¶ 9} On December 8, 2006, the marshals arrived at the East 66th Street location around 9:00 a.m. They surrounded the house, knocked on the door, and loudly announced their presence. During the approximate four minutes they waited for someone to answer the door, the marshals heard someone running up and down the stairs inside. The marshals continued to knock. Finally, Mansaray answered the door. He was told about the arrest

warrant for Williams. He made conflicting statements regarding Williams's most recent "visit" to his home. The marshals told him they needed to look for Williams in the house; Mansaray was detained while they searched the home. Because the object of the marshals' search was Williams, they only looked in areas big enough for a human to hide. In plain view, the marshals observed on the top of a bedroom dresser and in a closet, plastic bags of what appeared to be ecstasy pills, along with money. Ammunition was found on a shelf in the basement.

{¶ 10} Once the residence had been fully searched and it was determined Williams was not present, the search stopped. The marshals called Cleveland police to handle the drugs found in Mansaray's home. While waiting for members of the narcotics unit to obtain a search warrant, the marshals learned that Williams had been located at Tower City. Several of the marshals left Mansaray's house to go to Tower City where they apprehended Williams.

{¶ 11} Based on this information, the trial court, relying on this court's decision in *State v. Johnson*, Cuyahoga App. No. 82697, 2003-Ohio-6641, denied Mansaray's motion to suppress. A jury found Mansaray guilty of drug possession and possession of criminal tools, but not guilty of drug trafficking. The trial court sentenced him to 11 years in prison.

Motion to Suppress

{¶ 12} In his first assigned error, Mansaray argues the trial court erred by denying his motion to suppress the evidence discovered by the U.S. Marshals in his home while executing the arrest warrant.

{¶ 13} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. On review, an appellate court must accept the trial court's findings of fact if those findings are supported by competent, credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592, 639 N.E.2d 498. After accepting such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met. *Id.*

{¶ 14} Based on the United States Supreme Court cases of *Payton v. New York* (1980), 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 and *Steagald v. U.S.* (1981), 451 U.S. 204, 212, 101 S.Ct. 1642, 68 L.Ed.2d 38, we conclude that as a matter of law, the trial court improperly denied Mansaray's motion to suppress.

{¶ 15} In *Payton*, the United States Supreme Court was presented with a New York State statute that allowed the police to enter a private residence without a warrant, consent, or exigent circumstances. After a thorough

review of the Fourth Amendment's history and relevant case law, the Supreme Court held that the police cannot enter a suspect's home to make an arrest without a warrant, consent, or exigent circumstances. The *Payton* Court held that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling *in which the suspect lives* when there is reason to believe the suspect is within." *Id.* at 603. (Emphasis added.) Accordingly, pursuant to *Payton*, an arrest warrant is sufficient to enter a person's residence to effectuate the warrant, if the police have reason to believe that the suspect lives in the home and is in fact at the home at the time the arrest warrant is executed.

{¶ 16} The year after the United State's Supreme Court issued *Payton*, it revisited the issue of utilizing arrest warrants to enter a home. In *Steagald*, the Supreme Court reviewed "whether, under the Fourth Amendment, a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant." The Supreme Court began its analysis by recognizing that to search a home, the police need a warrant, consent, or exigent circumstances. In *Steagald*, police armed with an arrest warrant entered a residence in an effort to find and arrest the subject of the warrant. They did not find him, but did discover illegal drugs, and the homeowner was subsequently charged with related drug offenses.

{¶ 17} The homeowner argued to the Supreme Court that the police lacked authority to enter the residence at issue. The Court agreed and held that the police can only do what the warrant authorized, which was arrest the person named in the warrant, not enter and search a third party's home for a possible guest. *Id.* at 213. The Court quoted *Payton* and found that while an arrest warrant conveys to the police the authority to enter the arrestee's residence to search for him, it does not give the police the power to search every house the arrestee may be visiting. *Id.* at 215. The Court noted that such power could be greatly abused by the police and was not intended by the drafters of the Fourth Amendment. *Id.* at 215 and 220. The *Steagald* Court concluded that to enter a third party's residence to effectuate an arrest warrant on the party's guest, the police must first obtain a search warrant for the residence. *Id.* at 222.

{¶ 18} Thus, pursuant to the above case law, when the police execute an arrest warrant, they can only enter a residence of a third party without a search warrant if they have a reasonable belief that the person named in the warrant lives at the residence and is in fact home. In the instant case, the evidence does not show that the marshals had a reasonable belief that Williams lived with Mansaray. Deputy Marshal Mark Herbert testified as follows:

“A: We began to hear the name of Yanko during the first two days of our investigation, that was somebody that [Williams] would be with.

“Q. Were you hearing this from the associates of Mr. Williams who you were interviewing?

“A. Yes. We had confidential sources that were telling us he would be with an individual named Yanko.” Tr. 154.

{¶ 19} He later again explained the basis for entering Mansaray’s house as follows:

“A. Okay, we had two separate confidential informants independently tell us he would be with Yanko Mansaray. Once we contacted the probation department on the late afternoon/evening of December 7th, they gave us all of Yanko Mansaray’s information and it matched the phone number we were now tracking. Then I consulted with our Electronics Surveillance Unit who confirmed that the phone was in the right area to be at Yanko Mansaray’s residence, so what we then, based on the pattern we had learned of Rodney Williams, was that he sold drugs all night long. Often didn’t get home until 8:00, nine o’clock in the morning, and based on everything we learned, we knew he really didn’t lay his head down for his sleep time until that time so we made the decision that on December 8th, the morning of December 8th, we were going to go to Yanko Mansaray’s house.” Tr. 159.

{¶ 20} He also stated that: “[W]illiams knew we were looking for him and he was moving every couple of hours * * *.” Tr. 159. This information did not provide evidence to support a reasonable belief that Williams lived at Mansaray’s house. The confidential informants did not state that Williams lived with Mansaray, just that he “would be with Mansaray.” While the tracking of Mansaray’s cell phone indicated that it was being used in the vicinity of Mansaray’s home, this would be expected because although

Williams was using the phone, it was still Mansaray's phone. There was no indication that Williams was exclusively using the phone. While the officers may have had a reasonable belief Williams was in the home, the evidence does not establish that they had a reasonable belief that Williams lived at the home. Therefore, to enter Mansaray's residence, in addition to the arrest warrant, they needed to present a search warrant.

{¶ 21} In denying the suppression motion, the trial court stated that it based its ruling on this court's opinion in *State v. Johnson*, Cuyahoga App. No. 82697, 2003-Ohio-6641. However, the law in *Johnson* is distinguishable because in that case, the person named in the warrant was the one contesting the search, not the homeowner. In *Steagald*, the court explicitly stated that "the narrow issue before [the Court was] whether an arrest warrant — as opposed to a search warrant — is adequate to protect the Fourth Amendment interests of persons not named in the warrant." *Steagald*, at 212.

{¶ 22} The reason for the distinction is because a person who does not live in the home cannot contest the search of the home. As this court in *State v. Smith* (Aug. 21, 1997), Cuyahoga App. No. 70855, explained:

"While an arrest warrant and a search warrant both serve to subject the probable-cause determination of the police to judicial review, the interests protected by the two warrants differ. An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect

an individual from an unreasonable seizure. A search warrant, in contrast, is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.”

{¶ 23} The state relies upon this court's decision in *State v. Tolbert* (1996), 116 Ohio App.3d 86, 686 N.E.2d 1375, to support its argument the search was valid. However, like in *Johnson*, the party in *Tolbert* asserting the violation was the person named in the warrant, not a third person.

{¶ 24} The cases in which this court concluded the homeowner's Fourth Amendment rights were not violated were cases in which the evidence supported the officers' contentions that they had a reasonable belief that the suspect lived in the home. In *State v. Barnes*, Cuyahoga App. No. 90690, 2008-Ohio-5602, cited by the state, we concluded the homeowner's rights were not violated because the police had a reasonable belief that the suspect lived in the house because the suspect was receiving his social security checks at that address. Recently, in *State v. Schaffer*, Cuyahoga App. No. 93948, 2010-Ohio-1744, we determined the homeowner's rights were not violated because a public records search indicated the homeowner's address was the suspect's last known address.

{¶ 25} Here, we do not have such concrete evidence. We merely have the ambiguous statements by informants that Williams “would be with”

Mansaray. The cell phone records indicated the cell phone Williams was using was being used in the vicinity of Mansaray's home; however, as we stated before, this is not unusual given it was Mansaray's phone. While this evidence may have established that the officers had a reasonable belief Williams was in Mansaray's home, the evidence did not establish they had a reasonable belief that he lived there; therefore, along with the arrest warrant, the marshals had a duty to obtain a search warrant.

{¶ 26} The instant case is similar to this court's decision in *State v. Bell* (Feb. 6, 1992), Cuyahoga App. No. 59701. In *Bell*, we concluded the homeowner's Fourth Amendment rights were violated because the police did not have a reasonable belief that the suspect was living in the home. In that case, the police were given information regarding the suspect's location from the co-defendant's wife. When the agents went to the address, they were given information that he was at another address. We concluded that the testimony was too ambiguous, because it did not provide information regarding whether Bell lived at the residence or was merely visiting. We have the same situation here. Accordingly, we sustain Mansaray's first assigned error.

{¶ 27} Given our disposition of the first assigned error, the remaining assigned errors are moot. App.R. 12(A)(1)(c).

Judgment reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR