IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES DALE VAUGHN,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
v.	)	Case No. F 2002-175
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

JOHNSON, PRESIDING JUDGE:

Appellant, James Dale Vaughn, was convicted by a jury in LeFlore County District Court, Case No. CF 2000-47, of Trafficking Methamphetamine (twenty grams or more), in violation of 63 O.S.Supp.1998, § 2-415 (Count 1); Unlawful Possession of Controlled Dangerous Substance without a Tax Stamp, in violation of 63 O.S.1991, § 450.8 (Count 2); Unlawful Use of Police Radio, in violation of 21 O.S.1991, § 1214 (Count 3); Unlawful Possession of Paraphernalia, in violation of 63 O.S.1991, § 2-405(B) (Count 4); Unlawful Possession of Firearm In Commission of a Felony, in violation of 21 O.S.1991, § 1287 (Count 5); and Carrying a Firearm After Conviction of a Felony, in violation of 21 O.S.Supp.1996, § 1283 (Count 6). (O.R. 74-79; Tr. 128-130) Jury trial was held before the Honorable George McBee, District Judge, on May 5th – 6th, 2000 and June 7, 2000. The jury set punishment on Count 1 at life imprisonment without the possibility of parole and a Twenty-Five Thousand Dollar ($25,000.00) fine; twenty (20) years imprisonment on Count 2; twenty (20) years imprisonment on Count 3; one (1) year imprisonment on Count 4;

twenty (20) years imprisonment on Count 5; and twenty (20) years imprisonment on Count 6. (O.R. 150-155; Tr. 455-456) Formal sentencing was held on June 20, 2000, and Judge McBee sentenced Appellant in accordance with the jury's verdicts. Judge McBee ordered Counts 1, 2 and 4 to be served concurrently with each other and Counts 3, 5 and 6 be served consecutively to each other and to Counts 1, 2 and 4. (O.R. 157-161)

Appellant filed an appeal from his convictions which was dismissed for lack of jurisdiction. *See* Order Dismissing Appeal, *Vaughn v. State*, F 2000-914 (Okl.Cr. February 27, 2001)(not for publication). Thereafter, Appellant was granted an appeal out of time, *Vaughn v. State*, PC 2001-0839 (Okl.Cr. July 27, 2001)(not for publication), and timely perfected this appeal.

Based on information obtained from a confidential informant, LeFlore County police officers obtained a search warrant for a residence in Wister, Oklahoma. Appellant lived at this residence with his father, step-mother and brother. Officers executed the search warrant on December 14, 1999.

In one of the bedrooms, officers found a blue bank bag which contained several ziplock baggies, a silver spoon and several syringes.[1] The baggies contained a tan-colored powdery substance which field tested positive for methamphetamine.[2] The positive findings for methamphetamine were later

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[1] State's Exhibit 3 is the blue bank bag. Four syringes were found in the bag; one had 58 units of a dark liquid. (State's Exhibit 6)

[2] State's Exhibit 30 contained all the items found in the blue bank bag. One ziplock baggie contained 20.7 grams of methamphetamine; one ziplock baggie contained twelve small bags which each had a little over one gram of methamphetamine; one ziplock baggie contained 27.7 grams of methamphetamine; and one ziplock baggie contained another 5.5 grams of methamphetamine. Two of the ziplock baggies were empty; another contained 52 empty small

confirmed by an OSBI forensic chemist. Total weight of the substances found in the bedroom which tested positive for methamphetamine was approximately seventy point five (70.5) grams. (Tr. 297) Officers found a wooden box in the chest of drawers which contained a set of scales and also drug paraphernalia, including another syringe, a baggie containing what appeared to be marijuana and another baggie containing powder residue was found inside. (Tr. 220-229) No tax stamps were affixed to any of the items testing positive for methamphetamine. (Tr. 154)

Officers also recovered an operating police scanner, and nearby, a list of various law enforcement frequencies. (Tr. 167-168, 171). In the dresser, officers also located several items of identification bearing the name of James Vaughn. (Tr. 161-166)

Appellant was present when the search warrant was executed and was arrested. He had $569.00 in his front pocket; $2,988.00 in his wallet, and a Lorcin .25 caliber pistol in his coat pocket. (Tr. 144, 231, 232)

At trial, Appellant admitted he had three prior felony convictions. He admitted the items of identification were his; the police scanner belonged to his girlfriend Brenda Alexander, and claimed the money he had was money received from his mother's estate. He denied knowledge of the pistol in the pocket of the borrowed coat he was wearing and also denied knowledge of the presence of any drugs in the residence.

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ziplock bags; and one ziplock baggie contained 7 grams of seeds. (*See* State's Exhibits 6, 7, 8, 9, 10, 13)

Any other relevant facts will be discussed as necessary. Appellant raises three propositions of error.

In Proposition One, Appellant claims the magistrate did not have a substantial basis for concluding probable cause existed to issue the search warrant, because it was based on unverified hearsay obtained from a confidential informant. Appellant contends all the evidence obtained as a result of the search should have been suppressed.[3]

Both parties agree that in deciding whether to issue a search warrant, the magistrate must determine "whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Where the parties in this case disagree is whether the information supplied by the confidential informant must be corroborated to show reliability prior to the issuance of the search warrant. Appellant suggests that where there are no details given in the affidavit to corroborate the hearsay of the confidential informant, the only method of corroboration is a controlled buy.

Our review on appeal is the validity of the trial court's ruling on the motion to suppress. The suppression of evidence is a judicial question and we will not reverse a ruling of the trial court upon a question of fact where there is

[3] A motion to suppress filed prior to preliminary hearing was argued at preliminary hearing and was denied after both parties briefed the motion. (O.R. 40, 42, 45-59) A second motion was

competent evidence reasonably tending to support the judge's findings. *Luna v. State*, 1970 OK CR 263, ¶ 5, 481 P.2d 814.

The State submits the affidavit of officer Danny Baker set forth a sufficient basis for the issuance of the search warrant and we agree. Although Appellant claims "the affidavit did not indicate that the informant had described either Mr. Vaughn or the place to be searched with any particularity," we note the affidavit as a whole suggests otherwise. In paragraphs five and six, found on pages one and two of the affidavit, the officer/affiant describes with particularity the location of the place to be searched - the residence of James Vaughn. (O.R. 9, 10) Thereafter, the affiant states, in part,

> Approximately three weeks ago I made contact with a confidential informant (CI) who had been providing information regarding illegal drug activity. The CI stated that they knew someone by the name of James Vaughn who was selling crank out of a van in front of his house and out of his house. The CI stated that Vaughn would sell out of the van during the day and out of his house at night. Additionally, the CI stated that they had been at Vaughn's house on five (5) other occasions and on each occasion they had observed Vaughn sell methamphetamine.
>
> On December 13, 1999 I was again contact by the (CI) who stated that they had been *at the above described residence* within seventy-two (72) hours of December 13, 1999 and observed a large quantity of a substance which they described as being methamphetamine. The CI stated that while he was present he observed James Vaughn take some "crank", which is slang terminology for methamphetamine, out of a blue bag and sell it to a a (sic) white male in the residence. While present they also observed additional quantities of methamphetamine in two (2) zip lock bags. The CI also stated that while Vaughn had the blue bag they observed approximately one (1) ounce of marijuana.

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filed prior to trial, and was presented to and denied by the trial judge. (O.R. 90-94; 5-23 Tr. 2-12)

(emphasis added)(O.R. 10) The "at the above described residence" language suggests the confidential informant had on some occasion described the location of James Vaughn's residence to the affiant. Additionally, the affidavit shows this officer had received reliable information from this confidential informant on at least three prior occasions. On those occasions, the "information proved to be true and correct and resulted in the confiscation of illegal drugs." (O.R. 10)

An officer's attestation to an observation of a controlled buy weighs heavily in establishing the reliability of a confidential informant; however, such evidence is not the standard which must be met for a warrant to issue upon the basis of a confidential informant's information. Under the totality of the circumstances, the task of the examining magistrate is to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the hearsay information, there is an air of probability that contraband will be found in a particular place. *Langham v. State,* 1990 OK CR 9, ¶ 7, 787 P.2d 1279, 1281. In this case, when viewed as a whole, we find the facts contained in the affidavit pertaining to the reliability of the informant, including the particularity of the informant's observations, were sufficient and established probable cause to justify the magistrate's issuance of the search warrant. *Morgan v. State,* 1987 OK CR 139, ¶¶ 4-5, 738 P.2d 1373, 1374. Therefore, we find the search warrant properly issued, the evidence was properly admitted and this proposition is denied.

Next Appellant claims the trial court erred when it did not require the State to disclose, *in camera*, the identity of the confidential informant, as required by Oklahoma statutes. 12 O.S.2001, § 2510(A) allows the State to refuse to disclose the identity of informants. Subsection C sets forth three exceptions to the privilege, and Appellant claims the third exception applied in this case and required the trial court to hold a hearing for disclosure. 12 O.S.2001, § 2510(C)(3) states

> If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the court or the defendant is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the court or defendant may require the identity of the informer to be disclosed. The court shall, on request of the government, direct that the disclosure be made in chambers. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of a proceeding under this subsection except a disclosure in chambers if the court determines that no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in chambers, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

Appellant argues the trial court failed to follow the statutory procedure as he was required by this statute to interview the officer outside the presence of Appellant and both attorneys to make an independent determination whether the informant was reliable. Appellant claims this violation of his statutory right deprived him of the opportunity to fairly and completely litigate the validity of the search warrant.

Prior to trial, defense counsel moved to require the State to disclose the identity of the confidential informant who provided information to law

enforcement which was used to obtain the search warrant. Defense counsel claimed the confidential informant was "a material part of every event" and therefore disclosure of his or her identity was a critical part of the defense. After hearing arguments from both parties and considering the case before it, the trial court concluded that disclosure of the identity of the informant was not material to the defense of the events underlying the criminal charges. (Tr. 117-122)

Whether disclosure of an informant's identity is compelled in a particular case is a matter within the discretion of the trial court. *Hill v. State*, 1979 OK CR 2, ¶ 16, 589 P.2d 1073, 1077. Where the defendant makes a timely demand for disclosure, he bears the burden of establishing by a preponderance of the evidence that the informer's identity is necessary and relevant to a fair defense. *Kovash v. State*, 1974 OK CR 26, ¶ 6, 519 P.2d 517, 520, *cert. denied*, 419 U.S. 830, 95 S.Ct. 52, 42 L.Ed.2d 55 (1974).

In this case, defense counsel made a timely demand for disclosure. His demand at trial was that disclosure was necessary because the confidential informer was a material witness necessary to the defense. The trial court determined that disclosure of the identity of the informant was not necessary to Appellant's defense because the confidential informant was not involved in any of the events which took place on December 14, 1999. The trial court had previously determined the affidavit for search warrant was sufficient to establish probable cause for the issuance of the search warrant, and within

that finding concluded the confidential informant's reliability was sufficiently shown.

In *McCoy v. State*, 1985 OK CR 49, ¶ 6, 699 P.2d 663, 664, the defendant claimed disclosure of the confidential informant's identity was necessary because information given by the informant was used to secure a search warrant for his residence. There, we said disclosure was not necessary, because the credibility of the information upon which the warrant was obtained was that of the officer/affiant who attested to his own observations of the controlled buy. We noted the additional information that the informant's information on prior occasions had been useful and led to other prosecutions was not necessary. *Id.* at ¶ 7, 699 P.2d at 665.

Unlike *McCoy*, in this case it was necessary to the issuance of the warrant that the affidavit for search warrant contain an attestation that the confidential informant had worked with the officer on other occasions and the information given in those cases had proven to be reliable, because the officer/affiant did not have first hand knowledge of the information. Here, the officer could not attest to his observations of a controlled buy, because there was not one. As we determined in Proposition One, however, such an attestation was not necessary where there was other information in the affidavit which showed to the magistrate that the officer/affiant had reason to believe the informant to be reliable. Because the court was satisfied that the reliability of the informant was sufficiently shown in the affidavit for the search

warrant, disclosure of the identity of the confidential informant to determine whether he was reliable or credible was not necessary.

The search warrant was issued on the basis of an adequate and sufficient affidavit; it resulted in the location and confiscation of illegal drugs and other items. Disclosure of the informant's identity would not have materially affected any issue at trial and would not have affected the outcome of the trial; disclosure was not necessary for Appellant to put forth a defense to the crimes charged. We find the trial court's refusal to require disclosure of the identity of the person whose information started the investigation by the police was not an abuse of discretion.

In his last claim of error, Appellant claims the jury was improperly instructed on the range of punishment applicable to Count 5 - Unlawful Possession of Firearm In Commission of a Felony, in violation of 21 O.S.1991, § 1287. Appellant testified at trial and admitted he had three prior felony convictions. (Tr. 336-337) The jury was instructed the minimum punishment for this crime, after two or more prior felonies, was imprisonment for not less than twenty (20) years and a fine of up to ten thousand dollars ($10,000.00). (O.R. 145) Defense counsel objected to this instruction at trial and his objection was overruled. (Tr. 387-388) The jury thereafter assessed punishment at twenty (20) years on this count. (O.R. 155; Tr. 456)

Title 21, Section 1287 does not criminalize simple possession of a firearm; it punishes the use of a weapon in conjunction with the commission, or attempted commission, of another felony. It is itself an enhancement statute

which creates a special enhancer for the underlying felony; an extra penalty is imposed "in addition to the penalty provided by statute for the felony committed or attempted." 21 O.S.Supp.1999, § 1287. Therefore, a conviction under this section cannot be enhanced under the general enhancement statute, because that would result in a double enhancement.

The appropriate punishment range was either not less than two (2) nor more than ten (10) years, as a violation of 21 O.S.Supp.1999, § 1287. Because the jury was not properly instructed as to the range of punishment on Count 5, we find the sentence imposed must be modified, and hereby is modified, to the minimum of two (2) years imprisonment.

The Judgment and Sentences imposed in LeFlore County District Court, Case No. CF 2000-47, Counts 1, 2, 3, 4, and 6 are hereby **AFFIRMED**. The conviction in Count 5 is also **AFFIRMED**, but the sentence is hereby **MODIFIED** to two (2) years imprisonment as previously set forth in this Opinion.

IT IS SO ORDERED.

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LUMPKIN, J.: CONCURS IN RESULT
CHAPEL, J.: SPECIALLY CONCURS
STRUBHAR, J.: CONCURS

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