



In the Missouri Court of Appeals Western District

STATE OF MISSOURI,	)	
	)	WD83626
Respondent,	)	
v.	)	
	)	
GARY ANDERSON,	)	FILED: April 27, 2021
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF BATES COUNTY THE HONORABLE JULIE A. HIGHLEY-KEUTZER, JUDGE

**BEFORE DIVISION TWO: W. DOUGLAS THOMSON, PRESIDING JUDGE,
LISA WHITE HARDWICK AND EDWARD R. ARDINI, JR., JUDGES**

Gary Anderson appeals from his conviction for animal abuse and the imposition of a \$100 fine. Anderson contends the circuit court erred by denying his motion to suppress evidence from a search warrant that was based on information unlawfully obtained during several warrantless searches. For reasons explained herein, we reverse the judgment.

FACTUAL AND PROCEDURAL HISTORY

Anderson raises cattle on his property. On December 24, 2013, and January 10 and February 5, 2014, deputies of the Bates County Sheriff's Department entered Anderson's property to investigate reports of animal abuse and neglect. During these investigations, the deputies observed and took photographs of the

condition of Anderson's livestock. Based on information obtained during the three searches, deputy Matthew Wiess applied for a search warrant and signed the accompanying affidavit. The warrant was granted and executed. Pursuant to the warrant, Dr. David Rybolt, a veterinarian, entered Anderson's property to inspect his livestock. Anderson was subsequently tried on six charges of animal abuse and one charge of resisting arrest. Anderson filed a motion to suppress evidence obtained during the three warrantless searches. The circuit court denied the motion based on the open fields doctrine and Deputy Wiess's testimony that he never entered the barn on Anderson's property. The court dismissed three counts of animal abuse at the close of the State's case. The jury found Anderson guilty on the remaining three counts of animal abuse and acquitted him of resisting arrest.

Anderson filed a civil lawsuit for the conversion of his cattle while in State custody. During discovery, the State provided new documentation contradicting the grounds upon which the search warrant and three warrantless searches were based. Specifically, the State produced Deputy Wiess's previously undisclosed incident report from his December 24, 2013 visit to Anderson's property. Therein, Wiess stated that he had entered Anderson's barn and that he had personally observed the cattle's food and water stores within. Both statements directly contradicted Wiess's testimony and sworn statement in the warrant affidavit. Based on that disclosure, Anderson filed a Rule 29.12 motion to vacate his

convictions for animal abuse. The circuit court granted the motion and vacated the convictions.

The State refiled the case, charging Anderson with three counts of animal abuse. Anderson filed a motion to suppress the evidence obtained during the three warrantless searches and the subsequent search based on the warrant. The circuit court granted the motion as to the three warrantless searches and suppressed all evidence therefrom. However, the court denied the motion with regard to evidence obtained from the search warrant. Before trial, the court further ruled, over Anderson's objection, that the photographs that had been suppressed could still be admissible if the State laid a proper evidentiary foundation. The State presented the testimony of Dr. Rybolt, who testified that the suppressed photographs were a fair and accurate depiction of what he had personally observed during the execution of the warrant. On those grounds and over Anderson's objection, the court admitted the photographs into evidence. The jury found Anderson guilty of one count of animal abuse (Count III), and the trial court ordered him to pay a \$100 fine. Anderson appeals.

STANDARD OF REVIEW

"Our review of a trial court's ruling on a motion to suppress is limited to a determination of whether there is substantial evidence to support the decision." *State v. Humble*, 474 S.W.3d 210, 214 (Mo. App. 2015). "We review the trial court's decision to grant a motion to suppress under an abuse-of-discretion standard." *Id.* "We will reverse the ruling only if it is clearly erroneous." *Id.*

“The trial court's ruling is clearly erroneous if we are left with a definite and firm impression that a mistake has been made.” *Id.* “We view all facts and reasonable inferences in the light most favorable to the trial court's ruling.” *Id.* “Despite the deference we afford the trial court's order, ‘[t]he ultimate issue of whether the Fourth Amendment was violated is a question of law . . . which this court reviews *de novo*.’” *Id.* (quoting *State v. Ramirez*, 152 S.W.3d 385, 391 (Mo. App. 2004)).

ANALYSIS

In his sole point on appeal, Anderson contends the court erred by denying his motion to suppress evidence from the warrant-supported search because the warrant was based on information unlawfully obtained during the three warrantless searches. “At a hearing on a motion to suppress, ‘[t]he State has the burden of showing by a preponderance of the evidence that the motion to suppress should be denied.’” *Humble*, 474 S.W.3d at 215 (citation omitted). “This includes both the burden of producing evidence and the risk of non-persuasion.” *Id.* (citation omitted).

The State argues that Anderson failed to preserve his contention that the court erred by denying his motion to suppress the warrant-supported search. “[W]hen a pretrial motion to suppress evidence is denied and the evidence is later offered at trial, the defendant must renew the motion or make a specific objection when the evidence is offered at trial to preserve the issue for appellate review.” *State v. Morgan*, 366 S.W.3d 565, 586 (Mo. App. 2012). Therefore, to preserve the

issue of admitting the testimony of Dr. Rybolt, who made his observations pursuant to the search warrant, Anderson must have also objected at the time the court admitted the testimony. See *id.* Anderson does not point to, nor do we find, any portion of the record demonstrating that he objected to the admission of Dr. Rybolt's testimony at the time it was offered. Consequently, we agree with the State that Anderson failed to preserve this issue for review.

Pursuant to Rule 30.20, "plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." *State v. Weyant*, 598 S.W.3d 675, 678 (Mo. App. 2020).

Plain error review is discretionary and involves two steps: first, we must determine whether the trial court committed evident, obvious, and clear error affecting the defendant's substantial rights; second, if plain error is found, we then consider whether the error actually resulted in manifest injustice or a miscarriage of justice.

Id. In denying Anderson's motion to suppress the warrant-supported search, the court correctly restricted its review of the warrant's validity to a determination of whether the issuing judge had a substantial common-sense basis to find probable cause. *State v. Henry*, 292 S.W.3d 358, 362 (Mo. App. 2009). The court also gave a great degree of deference to the issuing judge's determination. *Id.* While ordinarily correct when considering a search warrant in isolation, the court failed to consider how its ruling to suppress evidence of the three warrantless searches affected the warrant application. Anderson contends that the circuit court should have redacted from its analysis any information in the warrant affidavit that was

the product of the three warrantless and illegal searches. We agree. However, “[t]he fact that illegally obtained evidence is included in the affidavit does not invalidate the warrant.” *State v. Oliver*, 293 S.W.3d 437, 443 (Mo. banc 2009). “The ultimate inquiry is not whether the affidavit contained allegations based upon illegally obtained evidence but whether, if setting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause.” *Id.*

We considered a similar situation to the case before us in *State v. Brown*, 382 S.W.3d 147 (Mo. App. 2012). In *Brown*, the State appealed the circuit court’s grant of Brown’s motion to suppress. *Id.* at 155. The circuit court granted the motion in two parts: first, it found that an unwarranted search of a home was an illegal search; second, it found that a search warrant which was issued based on evidence obtained during the first illegal search was invalid. *Id.* We reversed the circuit court’s decision as to the validity of the search warrant on the ground that removing the taint of the illegal search still left sufficient evidence for the issuing court to find probable cause. *Id.* at 169-70. In reaching our decision, we outlined, at length, the process that a circuit court must follow when a motion to suppress covers both an unwarranted search and a subsequently issued warrant based on the fruit of that search:

If the court were evaluating only warrant-supported searches, the court would exclude from consideration all evidence external to the warrant documents. But when the court must simultaneously consider external evidence as it relates to any warrantless searches that the court finds to be improper, the court may disregard

observations in the warrant application that are tainted by the unlawful conduct. If the affidavit and application do not provide sufficient untainted information supporting probable cause to support the search warrant, then the evidence seized under the warrant must also be excluded.

Id. at 162 (internal citations omitted). We further emphasized that the circuit court must still analyze the validity of the warrant through the eyes of the issuing judge, but only *after* removing the tainted portions of the warrant from consideration. *Id.* at 166-69. We concluded:

To do otherwise would encourage improper police procedure that violates someone's rights, even if not the rights of the defendant in question. The question, then, is whether the *remainder* of the information set forth in the affidavit was sufficient, viewed in retrospect, to allow it to be said that there was still sufficient untainted and properly obtained information in the affidavit to support the issuance of the warrant. This issue of Fourth Amendment law is determined *de novo*.

Id. (internal citations omitted). Here, by ruling to suppress the evidence from the three warrantless searches, the court necessarily determined that the evidence therefrom was illegally obtained. Therefore, the court should have first redacted the tainted information from the affidavit and then assessed the untainted remains to determine if they contained a sufficient common-sense basis for the issuing court to find probable cause. *See id.* It does not appear that any such assessment was made in this case.

Instead, the circuit court found that Anderson did not impeach the tainted information in the warrant affidavit via testimonial evidence at the motion

hearing. Therefore, because Anderson did not challenge the contents of the affidavit, the court concluded that it was required to rely on the entire unredacted warrant application without regard to the taint of the unwarranted searches supporting it. In doing so, the court essentially ignored how its decision to suppress evidence acquired in the three warrantless searches both evinced and concluded that Deputy Wiess's observations were the fruit of illegal searches. As a result, those observations in the warrant affidavit were tainted and should have been redacted prior to the court's assessment of probable cause. *Brown*, 382 S.W.3d at 166-69.

Information obtained during the suppressed searches fills the majority of the supporting affidavit. If the tainted information from the affidavit had been set aside, the issuing judge would have been left with an undated claim that a neighbor once threw a bale of hay onto Anderson's property, and that Anderson built a fence around that bale of hay so his cattle could not eat it. Beyond that, the redacted affidavit contains a summary statement that "[t]his is not the first complaint received by law Enforcement Officer regarding Gary Anderson abusing or neglecting his cattle." After isolating the untainted information, we must analyze the issuing court's basis for finding probable cause. *Id.*

[P]robable cause to search exists when, at the time the magistrate issues the warrant, there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought constitute fruits, instrumentalities, or evidence of crime and will be present at the time and place of the search.

State v. Wilbers, 347 S.W.3d 552, 558 (Mo. App. 2011). “The duty of a reviewing court is simply to ensure that the issuing court had a substantial basis for determining that probable cause for the search did exist.” *State v. Bryan*, 529 S.W.3d 334, 339, (Mo. App. 2017).

We find that the issuing court did not have a substantial basis to find probable cause without the tainted information. While questionable, erecting a fence around an uninvited bale of hay from a neighbor is not, by itself, sufficient to support probable cause for the charged offense. Even in the light most favorable to the verdict, the statement does not allege that Anderson’s cattle were abused or neglected; rather, it merely states that Anderson’s neighbor threw a bale of hay over the fence and that Anderson would not let his cattle eat *that singular bale*. At best, this information permits an inference that Anderson’s cattle appeared hungry to his neighbor and that Anderson willingly withheld *the neighbor’s* food. While favorable to the verdict, this inference alone does not form a “substantial basis” to find probable cause of animal abuse or neglect.

What remains is the summary statement that Deputy Wiess had received complaints about Anderson abusing or neglecting his cattle in the past. This statement is also favorable to the verdict, but it does not provide the identity of the informants, the number of complaints, the dates of the complaints, the severity of the complaints, the reliability of the complaints, or even the content of the complaints. These omissions render the blanket statement a far cry from “reasonably trustworthy facts.” Without more, the untainted portions of the

affidavit do not demonstrate a substantial, common-sense basis for the issuing court to believe evidence of a crime would be present on Anderson's property.

The State concludes, without argument or explanation, that, "even if the search warrant affidavit is stripped of the summary of the three prior warrantless entries onto Defendant's land, it is still a sufficient showing of probable cause in support of the search warrant." Unsupported and conclusory statements are unpersuasive. *See Frazier v. City of Kansas City*, 467 S.W.3d 327, 346 (Mo. App. 2015). Given the clarity of the law on this issue and the near barren remains of the untainted affidavit, which undoubtedly prohibit a finding of probable cause, we find this error to be "evident, obvious, and clear." The first prong of our plain error review is satisfied.

The second prong of plain error review requires a determination of whether manifest injustice actually occurred. "In order to justify reversal for plain error, a defendant must demonstrate that error in the circuit court resulted in a manifest injustice." *State v. Renfrow*, 495 S.W.3d 840, 844 (Mo. App. 2016). "[P]lain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative." *State v. Brown*, 596 S.W.3d 193, 213-14 (Mo. App. 2020) (citing *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002)).

Anderson contends:

At trial, the State's case-in-chief relied only on the testimony of two individuals who entered the property under the authority of the search warrant: Deputy (sic) and Dr. David Rybolt. Dr. Rybolt specifically testified he did not enter the property until a search

warrant was signed. If there was no probable cause for that order, then Dr. Rybolt's observations were fruit of the poisonous tree.

Anderson further argues that if Dr. Rybolt's testimony is inadmissible, then the foundation upon which the majority of the State's evidence was admitted also crumbles. We agree. Both of the State's witnesses entered Anderson's property pursuant to the search warrant. Without the testimony of *any* witnesses, the State would be unable to support its case-in-chief with admissible evidence.

Anderson was found guilty of Count III, which involved the mistreatment of a cow with an injured foot. If the warrant-based search had been suppressed, the State would have been unable to admit any of its evidence from its case-in-chief depicting, describing, or affirming the existence of the injured cow's foot. The State also would have lacked Dr. Rybolt's testimony upon which it relied to demonstrate that Anderson mistreated the cow and its injury. Indeed, the State would have had virtually no evidence to submit from its own case-in-chief. In the absence of evidence for the jury to even consider the subject of Count III—let alone find Anderson guilty—but for the court's error in denying the motion to suppress, then the error was necessarily outcome determinative. Thus, we find that the court's error resulted in manifest injustice. The two prongs necessary for relief under plain error review are satisfied.

Consequently, we need not address at length Anderson's other contention about the suppressed photographs. Our decision to find the search warrant invalid necessarily renders the issue of the photographs moot. Without the

foundation laid by Dr. Rybolt, whose testimony should have been suppressed, the photographs were inadmissible.

We find that the circuit court committed plain error by denying Anderson's motion to suppress the search warrant and evidence obtained therefrom.

CONCLUSION

The judgment is reversed, and the case is remanded for disposition consistent with this opinion.



LISA WHITE HARDWICK, JUDGE

ALL CONCUR.