

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
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STATE OF OKLAHOMA

FEB - 8 2006

THE STATE OF OKLAHOMA,)
)
 Appellant,)
)
 vs.)
)
 WILLIAM PAUL CANNON II AND)
 GLEN C. KUENSTLER,)
)
 Appellees.)

MICHAEL S. RICHIE
CLERK

No. S-2005-657

ACCELERATED DOCKET ORDER

On February 23, 2005, Appellees William Paul Cannon II and Glen C. Kuenstler, were both charged with Unlawful Possession Of A Controlled Drug with Intent to Distribute - Marijuana, and Unlawful Possession of Drug Paraphernalia, in Case No. CF-2005-94 in the District Court of Pittsburg County. On April 7, 2005, a preliminary hearing was held before the Honorable James D. Bland, Associate District Judge. Appellees Cannon and Kuenstler moved to suppress the evidence obtained as a result of a search warrant issued in the matter, alleging that the warrant was obtained as the result of an illegal search. Judge Bland took the matter under advisement and on June 17, 2005, issued an order granting the Appellees' Motion to Suppress. The State appealed the ruling, and on June 27, 2005, the Honorable Elizabeth Brown, Associate District Judge, affirmed Judge Bland's ruling. From this ruling, the State appeals.

On appeal, the State raised one proposition of error:

1. The Affidavit for Search Warrant contained sufficient probable cause even excluding any improperly obtained evidence.

Pursuant to Rule 11.2 (A)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App.(2006) this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions or issues were presented to this Court in oral argument January 26, 2006, pursuant to Rule 11.2(F). At the conclusion of oral argument, the parties were advised of the decision of this Court. Judge Bland's ruling granting the Appellees' Motion to Suppress is **AFFIRMED**.

The pertinent facts in this case are not in dispute. Officer Chris Morris of the McAlester Police Department was dispatched to a McAlester residence to investigate a caller's report that he smelled marijuana coming from the home. Morris smelled the marijuana as he approached the residence, where Appellees Cannon and Kuenstler resided. Morris entered the home, and, according to testimony at the preliminary hearing, searched the immediate area where the Appellees were seated. Cannon and Kuenstler testified at preliminary hearing that Morris was not invited to enter the premises, nor was he invited to search the residence.¹ They testified that Morris opened a drawer of a coffee table and a lidded box where he discovered marijuana and a pipe. Morris called for back up and provided Detective Ryan Green with a narrative statement of the events that transpired that evening. Green submitted the statement along with an affidavit, and a search warrant was issued. The search of the house subsequent to the issuance of the search warrant resulted in the discovery of

marijuana, digital scales, plastic baggies, a weapon and ammunition for the same, and numerous other items related to the charges which were subsequently filed.

At preliminary hearing, the Appellees argued that the initial entry into the residence was illegal, that the initial search of the residence was illegal, and that the evidence discovered pursuant to the search warrant should be suppressed because the warrant was issued based upon illegally seized evidence. The State conceded that the initial search of the premises was illegal, however the smell of marijuana constituted sufficient probable cause for issuance of a search warrant. The State argued that the evidence acquired during the illegal search should be suppressed, but the evidence subsequently obtained after the search warrant was issued was admissible.

In his order granting the Motion to Suppress, Judge Bland found that there was a partial search of Appellees' residence prior to issuance of a search warrant. Since no exigent circumstances were presented for the "warrantless, nonconsensual search", the initial search was illegal. Judge Bland determined that there were two issues to be addressed: (1) whether the items discovered during the initial search should be suppressed; and (2) whether all items seized, including those seized pursuant to the search warrant, should be suppressed. The District Court ruled that the items seized prior to the warrant were illegally seized and should be excluded.

¹ Morris did not appear or testify at the preliminary hearing.

Judge Bland then addressed the second issue. He determined that the information from the warrantless search “was significant, if not critical to, the subsequent warrant.” Judge Bland noted that because the illegally seized items formed the basis for the initial warrant, “the use of such information to obtain the warrant defeats the suggestion that the items subsequently seized constitute evidence ‘so attenuated as to dissipate the taint’, and that the evidence is also subject to the exclusionary rule.” Exclusion of the evidence resulted in the State’s inability “to prove probable cause of the commission of the crime alleged” and Judge Bland ordered the case dismissed.

We agree. We find no error of law in Judge Bland’s ruling. The State argues that the correct test to be applied in this case is that articulated in *Franks v. Delaware*, 438 U.S. 154 (1978), wherein the Court suggests that false or reckless statements in a warrant should be set aside and the warrant then examined to determine if what is left is sufficient to sustain probable cause. The State also cites the Court’s decision in *Murray v. United States*, 487 U.S. 533 (1988) for the proposition that exclusion of evidence of a crime which has an independent source puts the police in a worse position than they would have been in had there been no error. In such instances, the evidence should be allowed assuming it would ultimately have been discovered had there been no error.

Applying the *Franks* test in this case would mean that the probable cause for the warrant would have been Officer Morris’ statement that he smelled marijuana coming from the house. Utilizing the *Murray* analysis, if

you put Officer Morris outside of the home, again, the probable cause for his warrant would have been the smell of marijuana. The State is correct in claiming that the scent of marijuana detected by Officer Morris upon approaching the house could have constituted sufficient probable cause to seek a warrant. *See, Asher v. State*, 1976 OK CR 59, 546 P.2d 1343. However, that would only be an accurate statement if the magistrate issuing the search warrant could be persuaded to issue a warrant based on the scent alone.

The search warrant issued in this case was signed by Judge Bland. As Judge Bland noted in his order granting the motion to suppress, the information and evidence acquired as a result of the illegal search constituted a substantial portion of the proffered probable cause for the search warrant. And, as *Murray* states, where there is unlawful entry prior to obtaining a warrant, the State has the burden of convincing the trial court that no information gained from the illegal entry affected either the law enforcement officer's decision to seek a warrant, *or the magistrate's decision to grant it. (emphasis added.)* In *Murray*, the appeals court was "absolutely certain" that the warrantless entry in no way contributed "in the slightest" either to the issuance of the warrant or the discovery of the evidence during the lawful search pursuant to the warrant.

Judge Bland was the magistrate who issued the search warrant in this case. In his order granting the motion to suppress, Judge Bland found *Murray* was "critically distinguishable" from the facts of this case: the information from the warrantless search was "significant, if not critical, to the subsequent

warrant.” Therefore, even if we apply the *Franks* test, and even if we adopted the findings of *Murray*, the motion to suppress, in this case, would still have been granted. Once you exclude the information from the illegal search, the only remaining basis for the warrant is the scent of marijuana. It is apparent from his ruling that Judge Bland would not have issued the search warrant in this case on the smell of marijuana alone.

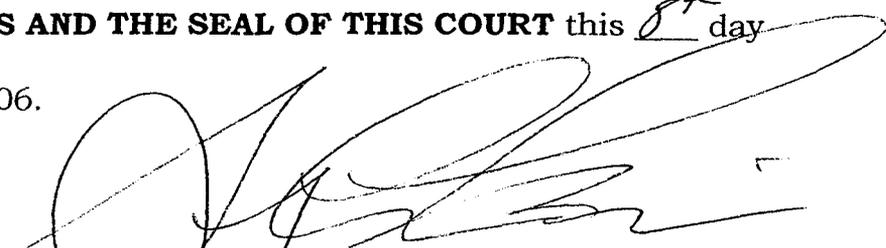
IT IS THEREFORE THE ORDER OF THIS COURT, by a vote of four (4) to zero (0) that the order of the *District Court of Pittsburg County* granting the Appellees’ Motion to Suppress in Case No. CF-2005-94 is **AFFIRMED**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

The Clerk of this Court is directed to transmit copies of this order to the District Court of Pittsburg County, the Honorable James Bland, Associate District Judge, the Honorable Elizabeth Brown, Associate District Judge, trial counsel, appellate counsel, the State of Oklahoma, and the Court Clerk of Pittsburg County.

IT IS SO ORDERED.

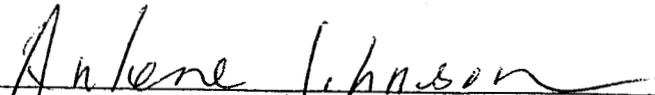
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 8th day
of February, 2006.



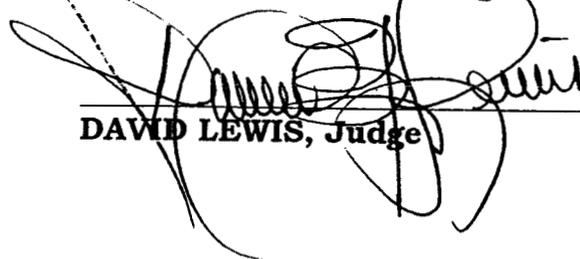
GARY L. LUMPKIN, Vice Presiding Judge



CHARLES A. JOHNSON, Judge

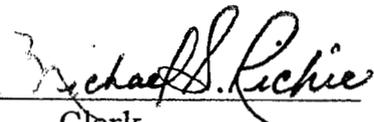


ARLENE JOHNSON, Judge



DAVID LEWIS, Judge

ATTEST:



Clerk

OA/F