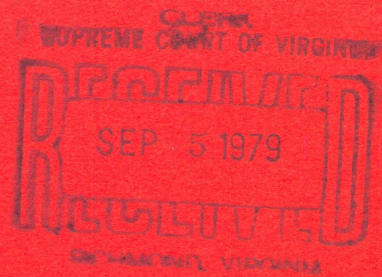


220 VA 692



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 781620

SCOTT ALLAN FAGAN,

.....Appellant

v.

COMMONWEALTH OF VIRGINIA,

.....Appellee

APPENDIX

BLANKINSHIP & KEITH
John C. Keith, Esq.
4020 University Drive
Fairfax, Virginia 22030

MORAN & GOLD
George D. Gold, Esq.
950 South Miami Avenue
Miami, Florida 33130

ATTORNEYS FOR APPELLANT

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Search Warrant

(Rule 3A.27)

To Sheriff of Albemarle County (1) or
any other Authorized Officer:

You are hereby commanded in the name of the Commonwealth forthwith to search

see attachment # 1

(Place to be searched)

for certain concealed property, namely marijuana, a controlled
substance (Describe property)

and to produce the property, if it be found, before the

General District Court of Albemarle County, Va
(Designation of Court)

On the basis of the sworn statement(s) of J. L. Higgins, Jr

the undersigned has found probable cause to believe the search should be made in relation to the

offense (s) of possession of marijuana with intent to distribute (2)

Issued at 7:30 P.m., September 21, 1977

on the basis of the above
information, I find probable
cause to issue a
search warrant

W. J. Russell
(Signature of Issuing Officer)

Magistrate
(Title of Issuing Officer)

W. J. Russell

- (1) Insert designation of officer, e.g., the Sheriff of Accomack County, or any Policeman of Alexandria City.
- (2) Give a brief description of the offense in relation to which the search is to be made, e.g., the murder of John Doe; possession of narcotics.

The above search warrant was executed by
me, at Lot 15 Oaklawn Trl. Ct. on this date 9-21-77 at
11:30 P.M. and the attached list of items seized.

A. C. Blakey, Jr.
Deputy Sheriff
Albemarle Co.

Affidavit for Search Warrant

(Rule 3A:27)

State of Virginia
County (City) of Albemarle

Before me, the undersigned, this day came J L Higgins Jr
(Name of affiant)

who, after being duly sworn, made oath that:

(1) He has reason to believe that on the premises known as Attachment #1

In the county (city) of Albemarle

there is now being concealed certain property, namely marijuana, a controlled substance

(2) He bases his belief that such property can be found on those premises on the following facts:

An informer has advised affiant that informer has personal knowledge that as of the afternoon of Sept 21, 1977, marijuana was in the said mobile home and would be there now

*(3) (a) He has personal knowledge of the facts set forth in paragraph (2).

or

*(3) (b) He was advised of the facts set forth in paragraph (2) by an informer. This informer's credibility or the reliability of the information may be adjudged by the following facts: Attachment #2

(4) (a) The offense in relation to which the search is to be made is: possession of

marijuana with the intent to distribute

(4) (b) The grounds for search and seizure are established by the following facts:** Property

to be searched for is marijuana (contraband)

*(5) (a) He has personal knowledge of the facts set forth in paragraph (4).

or

*(5) (b) He was advised of the facts set forth in paragraph (4) by an informer. This informer's credibility or the reliability may be adjudged by the following facts: Same as paragraph 3b

James L. Higgins Jr
(Signature of Affiant)

Capt. ALBEMARLE County Sheriff, FFD
(Official Title, if any)

Subscribed and sworn to before me on 7:30 PM September 21, 1977

Walter W. Russell
(Signature and Title) Magistrate

*If subparagraph (a) is applicable, strike out subparagraph (b). If subparagraph (b) is applicable, strike out subparagraph (a) and set forth the relevant facts in the space provided in subparagraph (b). The informer need not be identified.

**Give reasons why the property should be searched for and seized. If the property to be searched for is contraband, a description of the property will suffice. If the property to be searched for was an instrumentality of a crime or was stolen or embezzled, set forth facts showing probable cause to believe that the property was an instrumentality of a crime or was stolen or embezzled. If the property to be searched for is property that was used or is being used in committing a crime, set forth facts showing probable cause to believe the property was used or is being used to commit a crime. If the property to be searched for is property constituting evidence of a crime or evidence, that a particular person committed a crime set forth facts showing probable cause to believe that seizure of the property will aid in a particular apprehension or conviction.

Attachment #1

Red and white, two bedroom mobile home on Lot 15, Oak Lawn Trailer Court on U. S. Route 29 North on the west side adjoining the Virginia Land Company Office. When entering the trailer park, one goes on the left fork road to Lot 15. The mobile home is occupied by Mike Brown and Ron Wood. To reach the trailer after taking the left fork turn right at the intersection; subject mobile home will be the fifth one on the left.

Attachment # 2

Informant is a reputable member of the community. Affiant has known the informant for the past five to six years and during this time informant has been regularly employed. Informant has no prior record of arrests or convictions. Informant in the past has given affiant information that has been proven to be true concerning drug activity in this area. Informant has given this information to affiant on one occasion and to C. S. Craft on another occasion. Affiant has personal knowledge that informant gave such verified information to C. S. Craft. Informant's reputation among the members of the Sheriff's Department of Albemarle County, Va., is that he is truthful and trustworthy.



COMMONWEALTH of VIRGINIA

BRIAN J. DONATO
JUDGE

Sixteenth Judicial District
General District Court of The County of Albemarle
Court Square
Charlottesville, Virginia 22901

S. M. HUDSON
CLERK

November 10, 1977

Fred G. Wood, Jr.
Assistant Commonwealth's Attorney
415 Park Street
Charlottesville, Virginia 22901

John T. Camblos, Esquire
Counsel for Defendant Fagan
414 E. Jefferson Street
Charlottesville, Virginia 22901

D. Michael Atkins, Esquire
Counsel for Defendant Brown
415 4th Street, N.E.
Charlottesville, Virginia 22901

Gentlemen:

I have considered the testimony and evidence produced at last week's hearing. In light of the recent decisions of the Supreme Court of Virginia, I have concluded that the defendant's motion should be overruled and that the affidavit as presented is valid and supports the issuance of the search warrant.

I must admit that I am still somewhat intrigued by the language in the Wheeler case which continually refers to "observe" or variations of that word. However, I feel that the law in its present state does not require that the word "personal knowledge" be used as anything other than a term of art when it is employed in the affidavit. Since I find it to be a term of art, I would agree with Black's Law Dictionary which indicates that "personal knowledge" is intended to mean knowledge not obtained or based on hearsay.

Fred G. Mood, Jr., Esquire
John T. Camblos, Esquire
D. Michael Atkins, Esquire
November 10, 1977
Page Two

Gentlemen, I enjoyed your presentations at the hearing. This is, it seems to me, a very interesting issue. I believe it is possible for some higher Court to rule that personal knowledge is too broad a term. Perhaps the Commonwealth will in the future refine the use of that word. I will leave that last matter to the office of the Commonwealth Attorney.

Respectfully yours,



Brian J. Donato
Judge

BJD:csp

ORDER

On this the 12th day of July 1978 , came the Attorney for the Commonwealth and the defendant , whose date of birth is July 15, 1956; and , who stands indicted for a felony, to-wit: feloniously possess with intent to distribute a controlled substance, to-wit: marijuana a Schedule 1 controlled substance in violation of Virginia Code Section 18.2-248, appeared in obedience to his recognizance, , and came also J. T. Camblos his attorney.

Whereupon the accused was arraigned and after private consultation with and being advised by his counsel, pleaded NOT GUILTY to the indictment, which plea was tendered by the accused in person. And thereupon, after having been first advised by his attorney and by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law, and the Commonwealth evidence having been heard, and having heard all of the evidence and argument of counsel, the Court finds the accused guilty of possession with intent to distribute , as charged in the indictment.

And it being demanded of the defendant if anything he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant is hereby sentenced to confinement in the penitentiary of this Commonwealth for the

term of eight years , and further imposes a fine of \$500.00, and that the Commonwealth of Virginia do recover against the defendant its costs in the amount of \$ 66.50 by it about its prosecution in this behalf expended.

After pronouncing sentence the Court advised the defendant of his right to petition for an appeal to the Supreme Court of Virginia, whereupon the defendant by his counsel advised the Court he desires to appeal the judgment rendered in this matter, and accordingly the Court suspends execution of the judgment for a period of thirty days and such additional time, as may be necessary, until the said appeal is acted upon. The Court further orders that the defendant's bond be increased from \$5,000.00 to \$10,000.00 within a thirty day period.

The Court further orders that the transcript in this case when filed shall become part of the record in this matter.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorney was likewise personally present and capably represented the defendant.

And the defendant is permitted to depart under his former bond .

S/DAVID F. BERRY, Judge

ASSIGNMENT OF ERROR

1. The trial court erred in denying the defendant's motion to suppress illegally seized evidence, which evidence was seized pursuant to a warrant which was supported by a defective and legally insufficient affidavit.