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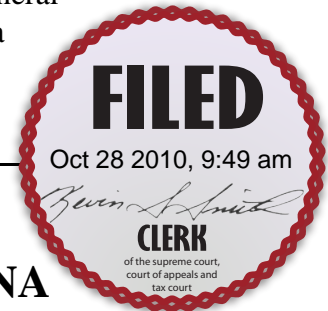
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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD D. STEWART,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 42A05-0912-CR-705

APPEAL FROM THE KNOX CIRCUIT COURT
The Honorable Sherry L. Biddinger-Gregg, Judge
Cause No. 42C01-0903-FB-20

October 28, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Richard D. Stewart (Stewart), appeals his conviction for Count I, dealing in methamphetamine, a Class B felony, Ind. Code § 35-48-4-1.1; Count II, possession of methamphetamine, a Class D felony, I.C. §35-48-4-6.1; and Count III, maintaining a common nuisance, a Class D felony, I.C. § 35-48-4-13.

We affirm.

ISSUE

Stewart raises one issue on appeal, which we restate as: Whether the trial court abused its discretion in admitting evidence obtained pursuant to a search warrant which was issued after the police officers initially entered Stewart's property.

FACTS AND PROCEDURAL HISTORY

On February 26, 2009, an informant told Bicknell City Police Officer Kevin Carroll (Officer Carroll) that Croyden Bowers (Bowers) intended to steal anhydrous ammonia, a necessary ingredient for the production of methamphetamine, and take it to Stewart's house to manufacture methamphetamine. Officer Carroll conveyed this information to Deputy Dean Schingeck (Officer Schingeck) of the Knox County Sheriff's Department. Officer Schingeck, together with Captain Wally Smith (Captain Smith) decided to go to Stewart's house, located in Ragsdale, Indiana.

Two different structures occupied Stewart's property: a vacant red house that appeared to be remodeled and a modular home. In addition, there was also a motor home on the property, occupied by Wesley Moore (Moore). After the Officers parked in front of the

property on a public roadway, they exited their vehicles, and detected a strong chemical odor, which based on their training, the Officers associated with the manufacturing of methamphetamine. When the Officers entered the property, they first approached the motor home. Moore advised the Officers that Stewart owned both the modular home and the vacant red house.

Upon getting close to the unoccupied red house, the Officers saw the front door boarded up and they walked around to the back of the house. Stepping onto the back porch, they noticed a very strong odor and found an entrance that was missing a door. Looking from the porch into the vacant house, the Officers observed a glass jar containing a blue liquid in the entrance way of the back door. Based on their experience, the Officers believed it to be Coleman fuel which is used in the production of methamphetamine. Officer Schingeck stuck his head in the door to “make sure there was no one around for [his] safety.” (Transcript p. 596). Upon looking inside, Officer Schingeck could see a liquid propane tank hanging from a rope from the ceiling. He also noticed that the tank had an altered valve and a hose hanging from it, which is typical for the storage of anhydrous ammonia.

While Captain Smith secured the scene, Officer Schingeck contacted the Knox County prosecutor, who arranged for a telephonic search warrant hearing to be held. Based upon Officer Schingeck’s testimony, the magistrate issued a warrant to search

[t]he premises at 11799 E. Fifth Street, Ragsdale, Knox County, Indiana, which I understand to be the site of a one-story manufactured home with gray siding and an adjacent property, apparently also owned by the same owner, an old wooden abandoned house adjacent to the manufactured home located at 11785 E. Fifth Street, Ragsdale, Knox County, Indiana, and also apparently three outbuildings and several vehicles on the property at those residences.

Police authorities are authorized to search diligently, including all buildings, structures, vehicles, fenced-in areas and any other enclosed area and/or closed container anywhere within the cartilage of those properties and vehicles for the following items: Controlled substances, evidence of the use, delivery or manufacture of controlled substances, chemical reagents and precursors, paraphernalia and indicia of occupancy.

(Exh. Vol. II, Defendant's Exh. A, pp. 11-12). With the aid of the Indiana State Police's methamphetamine suppression unit, Stewart's property was searched and methamphetamine, precursors, and the instruments needed to produce methamphetamine were found.

On March 10, 2009, the State filed an Information charging Stewart with Count I, dealing in methamphetamine, a Class B felony, I.C. § 35-48-4-1.1; Count II, possession of methamphetamine, a Class D felony, I.C. § 35-48-4-6.1; and Count III, maintaining a common nuisance, a Class D felony, I.C. § 35-48-4-13. On June 10, 2009, Stewart filed his first motion to suppress, challenging the validity of the search warrant by claiming that it was based on illegally obtained evidence. On June 17, 2009, after a hearing, the trial court concluded that

The initial entry onto the property was justified and reasonable, as well as the observation of the clear glass jar located in plain view, and enough valid, untainted information supplied the basis for the probable cause for the issuance of the search warrant, the search warrant was properly granted and the evidence obtained thereunder should not be suppressed.

(Appellant's App. p. 59). On June 22, 2009, at Stewart's request, the trial court certified its order for interlocutory appeal and stayed the proceedings. However, on August 5, 2009, this court denied Stewart's request for an interlocutory appeal. Also on June 22, 2009, Stewart filed a second motion to suppress alleging that the search warrant was overbroad. On August

20, 2009, after hearing evidence, the trial court denied Stewart's second motion to suppress.

In its Order, the trial court stated

In this case, the [c]ourt concludes that the Search Warrant was not overbroad and that the exception set forth in *Figert* [v. State, 686 N.E.2d 827, 830 (Ind. 1997)] applies. The basis for this ruling is that in this instance, the two dwellings are located next to each other, on the same property, under the dominion of one person, the target of the investigation, the police have not only their own experience with the defendant and their own observations at the time, but also information from the defendant's neighbor as to the defendant's ownership of the property, who the officers would have no reason to doubt, and we do not have a situation where an overbroad application of the exception would allow officers to conduct search of residences merely because of their close proximity to illegal conduct; something more is required to ensure that constitutional protections remain in place.

(Appellant's App. pp. 138-39).

On August 26 through August 28, 2009, a jury trial was conducted. After hearing the evidence, the jury found Stewart guilty as charged. On November 2, 2009, the trial court sentenced Stewart to fourteen years imprisonment with two years suspended for dealing methamphetamine and to two years each for possession of methamphetamine and maintaining a common nuisance, with all sentences to be served concurrently.

Stewart now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

Stewart contends that the trial court abused its discretion when it denied his motions to suppress evidence. Although he originally challenged the admission of the evidence through two motions to suppress, Stewart appeals following a completed trial where he challenged

the admission of such evidence. Thus, the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We have indicated that our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), *trans. denied*. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *reh'g denied, trans. denied*. However, we must also consider the uncontested evidence favorable to the defendant. *Id.*

II. *Search Warrant*

In support of his argument that the trial court abused its discretion, Stewart presents us with a two-fold claim: (1) because the police entered and searched the property illegally prior to obtaining a search warrant, the subsequent search warrant was based upon improperly obtained information and thus invalid pursuant to the Fourth Amendment of the United States Constitution and Article 1, section 11 of the Indiana Constitution and (2) the issued search warrant was overbroad because it also included the modular home even though no facts had been established that supported the inference that a crime could be found in the modular home. We will review each claim in turn.

A. *Probable Cause for Search Warrant*

Stewart maintains that the Officers' entrance on his property and their initial warrantless search of the vacant red house violated the Fourth Amendment of the United

States Constitution and Article 1, section 11 of the Indiana Constitution and thus the subsequent search warrant which was issued based on the information collected during the illegal search is invalid.

1. *Fourth Amendment*

The Fourth Amendment protects citizens against unreasonable searches and seizures of persons and property by requiring a warrant based on probable cause. *Moore v. State*, 827 N.E.2d 631, 637 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. Probable cause exists when an officer has knowledge of facts and circumstances that would lead a reasonably prudent person to believe that a crime has been committed. *Id.* The Fourth Amendment does not protect objects, activities, or statements that a citizen has exposed to the plain view of outsiders because the individual has expressed no intention of keeping those activities private. *Trimble v. State*, 842 N.E.2d 798, 801 (Ind. 2006). The protection afforded by the Fourth Amendment extends to the curtilage in order to protect personal and familial privacy in an area that is physically and psychologically linked to the intimacy of the home. *Id.* at 802. However, there is no Fourth Amendment protection for activities or items that, even if within the curtilage, are knowingly exposed to the public. *Id.*

Furthermore, police entry onto private property and their observations do not violate the Fourth Amendment when the police have a legitimate investigatory purpose for being on the property and limit their entry to places visitors would be expected to go, such as walkways, driveways, and porches. *Id.* The route which any visitor to a residence would use is not private in the Fourth Amendment sense, and thus if police use that route for the

purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open. *Id.* Which areas of a given piece of real estate may reasonably be viewed as open to visitors is fact-specific. *Id.* The determination will necessarily include consideration of the features of the property itself, such as the existence of walkways and fences or other obstructions to access or viewing, the location of primary residential entryways, as well as the nature or purpose for the visitor's call. *Id.*

Here, the evidence reflects that Officer Schingeck received information indicating that Stewart was manufacturing methamphetamine at his residence. Together with Captain Smith, he decided to go to Stewart's house. When they parked their vehicle in front of Stewart's property, they detected a strong chemical odor, which they associated with the manufacture of methamphetamine. Entering the property and approaching the red vacant house, they saw that the front door was boarded up and thus, they walked around to the back of the house. The record shows that when the Officers stepped onto the back porch of the vacant house which was missing a back door, they detected that the chemical odor became stronger and they observed a glass jar containing a blue liquid in the entrance way of the door. They identified the liquid in the jar as Coleman fuel, an ingredient in the production of methamphetamine.

Stewart now contends that the Officer's observation that a propane tank was hanging from the ceiling amounted to an illegal entry in the house which invalidated the search

warrant.¹ During the trial, Officer Schingeck testified that after he noticed the glass jar from his vantage point at the back door, he “stuck [his] head in [the door] . . . [a]nd I could see an L-P tank hanging from the ceiling.” (Tr. p. 596). While we agree with Stewart that by sticking his head inside the house Officer Schingeck might have illegally entered the house, we nevertheless do not need to decide this issue as we conclude that the search warrant does not violate Stewart’s Fourth Amendment rights.

Initially, the Officers entered Stewart’s property legitimately to conduct an investigation of a report that Stewart was manufacturing methamphetamine and to determine the source of the chemical odor that was emanating from the property. They limited their entrance to places visitors would be expected to go and upon noticing that the front door of the vacant house was obstructed, they walked to the entrance where a back door used to be. Standing on the porch, the Officers noticed a strong chemical odor and saw a glass jar which was readily visible through the entrance and which contained a blue liquid. Based on these observations, we find that Officers had sufficient probable cause which supported the issuance of the search warrant. Therefore, the search of Stewart’s property did not violate his Fourth Amendment rights.

¹ In response, the State relies on exigent circumstances to justify Officer Schingeck warrantless entry into the vacant red house. However, the State failed to present this argument during the motion hearing or at trial. As a party may not raise an issue for the first time on appeal, we find the State’s argument waived. *See McClendon v. State*, 671 N.E.2d 486, 489 (Ind. Ct. App. 1996).

2. Article 1, section 11 Indiana Constitution

Despite the fact that the text of Article 1, section 11 is nearly identical to the Fourth Amendment, Indiana courts interpret and apply it independently from Fourth Amendment jurisprudence. *Traylor v. State*, 817 N.E.2d 611, 615 (Ind. Ct. App. 2004), *trans. denied*. Instead of focusing on the defendant's reasonable expectation of privacy, we focus on the actions of the police officer, concluding that the search is legitimate where it is reasonable given the totality of the circumstances. *Trimble*, 842 N.E.2d at 803. We will consider the following factors in assessing reasonableness: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion, the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs. *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005).

In the instant case, there was a high degree of suspicion that methamphetamine was being manufactured on Stewart's property. Not only were the Officers apprised by an informant's tip, but when they arrived at Stewart's property, they also encountered a strong chemical smell which the Officers associated with the production of methamphetamine. As the front of the vacant red house was inaccessible, the Officers proceeded to the back of the house where they noticed the glass jar containing a blue liquid. At the same time, the degree of the Officers' intrusion was minimal as the Officers commenced their intrusion on a public road and then proceeded onto Stewart's property, entering at places where visitors would be expected to go. Finally, the need for law enforcement was great. Although the officers smelled a chemical odor from the public road, entry on Stewart's property was necessary to

pinpoint the source of the odor, especially in light of the three different structures on his property. Therefore, based on the totality of the circumstances, we conclude that the Officers' entry and subsequent search warrant did not violate Article 1, section 11 of the Indiana Constitution.

III. *Language of the Search Warrant*

As a second issue, Stewart asserts that the trial court abused its discretion by relying on *Figert v. State*, 686 N.E.2d 827 (Ind. 1997) to conclude that the search warrant was not overbroad when it included the modular home as well as the red vacant house as places to be searched. Specifically, Stewart alleges that the Officers did not present evidence establishing probable cause that a crime would be found in the modular home.

In deciding whether to issue a search warrant, the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit 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). The duty of the reviewing court is to determine whether the magistrate had a substantial basis for concluding that probable cause existed. *Id.* at 238-39, 103 S.Ct. 2332. A substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. *Houser v. State*, 678 N.E.2d 95, 99 (Ind. 1997).

In *Figert*, 686 N.E.2d at 830, our supreme court noted that “[a]s a general proposition, a search of multiple units at a single address must be supported by probable cause to search each unit and is not different from a search of two or more separate houses.” Based on this general proposition, the State was then required to make a separate showing of probable cause to search Stewart’s modular home and the vacant red house. However, the *Figert* court determined that

[a]n exception to the requirement of probable cause to search each unit at one address has been recognized where the units are under the common dominion or control of the target of the investigation or, . . . , are used as a ‘collective dwelling.’

Id. at 830-31.

We agree with the trial court that the *Figert* exception applies in the situation before us. Stewart was one of the subjects of the investigation as the Officers had been informed that methamphetamine was going to be manufactured at his property. At trial, Officer Schingeck testified that there were three different structures in close proximity on Stewart’s property: a red vacant house, a modular home, and a motor home. When the Officers entered the property, they first approached the motor home. Moore, the occupant of the motor home, advised the Officers that Stewart owned both the vacant house and the modular home. As such, we conclude that because the two dwellings are located next to each other, on the same property, and under the dominion of one person, the probable cause that existed

to search the vacant red house also supported a search of the modular home. We affirm the trial court.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly admitted evidence obtained pursuant to a search warrant issued after the officers initially entered Stewart's property.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.