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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001510-MR

ROGER MCLEVAIN[1] APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 04-CR-00003

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND MINTON, JUDGES.

JOHNSON, JUDGE: Roger McLevain has directly appealed from the judgment and sentence entered June 28, 2004, by the Muhlenberg Circuit Court, based on the denial of his motion to suppress evidence seized as the result of a warrantless search, and the trial court's denial of his motions for mistrial and a directed verdict of acquittal. Having concluded that the trial court did not err, we affirm.

[1] Although the notice of appeal in this case lists the appellant's name as "McLavain", we note that throughout the circuit court record the appellant's name is spelled "McLevain".

The charges stemmed from a search that occurred at McLevain's residence on January 22, 2004. On February 6, 2004, McLevain was indicted for trafficking in a controlled substance in the first degree,[2] possession of a controlled substance in the first degree while in possession of a firearm,[3] receiving stolen property valued at $300.00 or more,[4] possession of a firearm by a convicted felon,[5] possession of drug paraphernalia,[6] and for being a persistent felony offender in the first degree.[7] On March 19, 2004, McLevain filed a motion to suppress the evidence seized as the result of a warrantless search of a backpack and fanny pack taken from a four-wheeler[8] on the premises of his residence.

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[2] Kentucky Revised Statutes (KRS) 218A.1412. The trafficking count charged McLevain "with the intent to sell methamphetamine, or by complicity with [Charles Stewart]." Stewart signed a guilty plea agreement identifying himself as being in complicity with McLevain. However, Stewart testified that he did not know that this statement was part of the guilty plea agreement when he signed it. Stewart testified that the contents of the backpack were his and he is currently serving a prison term for the same charges as McLevain.

[3] KRS 218A.1415 and KRS 218A.992.

[4] KRS 514.110.

[5] KRS 527.040.

[6] KRS 218A.500 and KRS 502.020.

[7] KRS 532.080(3).

[8] From time to time throughout this Opinion we may refer to the four-wheeler as a vehicle, just as we would an automobile. A four-wheeler, all-terrain vehicle, is defined as "[a] small, open motor vehicle having one seat and three or more wheels fitted with large tires. . . ." American Heritage Dictionary of the English Language (4th ed. 2000). The legal definition of a vehicle is "something used as an instrument of conveyance; any conveyance used in transporting passengers or merchandise by land, water, or air." Black's Law Dictionary 155 (7th ed. 1999). There is no specific law

A suppression hearing was held in this case on March 22, 2004.[9] Muhlenberg County Sheriff Jerry Mayhugh testified that on January 22, 2004, he, along with Deputy Bob Jenkins and Deputy Kathy McDonald, went to the residence of McLevain and Sherry Neal at 220 McConnell Lane, Central City, Muhlenberg County, Kentucky, to serve a mental health arrest warrant on Neal. The arrest warrant was obtained for Neal based on an affidavit from her mother, Mary Groves, that Neal was mentally ill and needed professional psychiatric treatment. Groves had also informed Sheriff Mayhugh of her suspicion that Neal was "strung out" on methamphetamine and that McLevain might be manufacturing methamphetamine.[10]

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regarding whether a four-wheeler is a vehicle for the purpose of criminal law in this Commonwealth. Specifically, four wheelers have been excluded as motor vehicles under the Motor Vehicle Reparations Act (MVRA). Manies v. Croan, 977 S.W.2d 22, 23 (Ky.App. 1998). However, four-wheelers have been considered motor vehicles for purposes of various criminal laws including DUI and possession of a stolen motor vehicle. See Commonwealth v. Pace, 82 S.W.3d 894 (Ky. 2002) (noting that a four-wheeler is a motor vehicle under the DUI statutes). See also Commonwealth v. Gonsalves, 778 N.Ed.2d 997, 999 (Mass.Ct.App. 2002) (noting that a four-wheel, all-terrain vehicle (ATV) Is a motor vehicle under the statute describing receiving or possession of a stolen motor vehicle). Thus, we see no reason why the four-wheeler should not be treated as a motor vehicle for the purposes of this case.

[9] Kentucky Rules of Criminal Procedure (RCr) 9.78 requires that an evidentiary hearing be held, outside the presence of the jury, to resolve the essential issues of fact raised by a defendant's motion to suppress the fruits of a search. The trial court's factual findings shall be held conclusive if supported by substantial evidence.

[10] Sheriff Mayhugh testified that he told Groves, if given the opportunity, he would like to look around McLevain's property for signs of drug activity and that he felt that "once [he] was inside [he] could either smell the odor or [he] could see the evidence . . .".

Sheriff Mayhugh testified that just as he and the deputies arrived at the residence[11], McLevain appeared from behind the house on a four-wheeler.[12] Sheriff Mayhugh stated that McLevain initially shut off the four-wheeler, but when McLevain saw Sheriff Mayhugh get out of his police cruiser, McLevain started the four-wheeler and pulled it into a garage located 30 to 50 feet[13] from the house. According to McLevain, earlier that day, Charles "Charlie" Stewart, McLevain's nephew, had driven the four-wheeler, which belonged to Stewart's mother, Patsy Stewart, to McLevain's house for repair.[14]

Sheriff Mayhugh testified that Deputy Jenkins and Deputy McDonald approached the house to look for Neal, while he approached McLevain and Stewart outside the garage. While standing just outside the garage, Sheriff Mayhugh informed McLevain and Stewart that he was on the premises to serve a mental health warrant on Neal.[15] Sheriff Mayhugh also testified that upon entering the garage area, he smelled a strong odor of ether or anhydrous ammonia, which was coming from a backpack

[11] Deputy Jenkins and Deputy McDonald arrived in a separate vehicle from Sheriff Mayhugh.

[12] McLevain testified he had been on the four-wheeler approximately four minutes at that time. Stewart testified that McLevain only "rode down the hill and back up the hill" on the four-wheeler.

[13] Approximately three car lengths away.

[14] The house where McLevain was living was owned by Patsy Stewart. She and Charlie also lived in separate homes on the same road. As of January 22, 2004, the day of the search, McLevain had only lived there one or two months.

[15] McLevain responded that Neal had "really been out there".

located in a basket attached to the front of the four-wheeler, previously driven by McLevain.[16]

Sheriff Mayhugh informed the two men that he had received complaints of drug trafficking at the residence,[17] and read both men their Miranda[18] rights.[19] McLevain questioned Sheriff Mayhugh as to why he was arresting him,[20] but Sheriff Mayhugh told McLevain that he was not under arrest and that it was department policy to give Miranda warnings anytime a discussion occurred regarding possible drug trafficking. McLevain asked Sheriff Mayhugh if he could smoke a cigarette and Sheriff Mayhugh agreed. Sheriff Mayhugh then asked McLevain if he could look around. McLevain consented.[21]

Sheriff Mayhugh approached the four-wheeler and

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[16] While Sheriff Mayhugh was approaching the garage, he noticed several cans of ether and some type of batteries in an old truck parked outside the garage. It is noted that these items were not obtained as evidence in this case, despite the search warrant later issued.

[17] Sheriff Mayhugh testified at the suppression hearing that he specifically had heard that McLevain was moving methamphetamine around the county and was hiding it in a tire. When he saw a tire machine near the garage, he believed the complaints were true.

[18] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[19] Sheriff Mayhugh testified that McLevain did not appear to have any weapons on his person, nor did Sheriff Mayhugh question McLevain about such.

[20] It is unclear from the facts whether McLevain asked if he was under arrest or why he was under arrest.

[21] Sheriff Mayhugh testified that McLevain said, "[y]ou can look anywhere you want to" or "look around all you like." McLevain argues to this Court that if Sheriff Mayhugh wanted to look around he should have obtained a search warrant. Obviously, his act of consent negates this argument.

noticed a backpack lying in the basket that was attached to the front of the four-wheeler. At that point, Sheriff Mayhugh testified that he smelled a strong odor from the backpack.[22] Sheriff Mayhugh described the odor as "an ammonia, anhydrous ammonia, ether combination smell."[23] Sheriff Mayhugh was not sure if it was a 50/50 combination but it was "an identifying odor once you've smelled the odor you won't forget it."[24] As Sheriff Mayhugh reached for the backpack, McLevain told him that he would have to obtain a warrant to search the backpack.[25] Sheriff Mayhugh testified that he made no further attempt to search the backpack at that time; however, McLevain testified that Sheriff Mayhugh propped the backpack open, but that he did not see the sheriff make any further effort to look in the backpack.

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[22] Sheriff Mayhugh testified at a later point in the suppression hearing that he smelled the strong odor coming from the four-wheeler before asking McLevain for consent to search.

[23] Sheriff Mayhugh testified that such a strong odor indicated that the methamphetamine was freshly manufactured.

[24] Sheriff Mayhugh testified that he had been sheriff of Muhlenberg County for almost 12 years, had specific training in identification of methamphetamine, and had been involved in hundreds of cases involving the discovery of methamphetamine labs and the recovery of the drug.

[25] McLevain testified that because the backpack did not belong to him, he thought he could not give consent to search it and therefore Sheriff Mayhugh would have to obtain a warrant. He further testified that he told Sheriff Mayhugh that it was not his backpack. The trial court, in its findings and order on the suppression motion, construed the action as a withdrawal of the consent. Further, the trial court found that there was no evidence introduced as to the owner of the fanny pack, but that it was located in the backpack which was on the four-wheeler driven by McLevain. Thus, the trial court found that McLevain had standing to challenge the seizure of the evidence in the fanny pack.

Sheriff Mayhugh testified that McLevain then asked if he could smoke another cigarette. When Sheriff Mayhugh agreed, McLevain walked to the other side of the four-wheeler, and then ran around the back of the garage and away from the residence. Sheriff Mayhugh testified that he only took a few steps in an attempt to catch McLevain,[26] and when he realized he could not catch him, he turned around and noticed Stewart opening the backpack and pulling out a fanny pack,[27] and trying to dispose of it.[28] Sheriff Mayhugh stated that he pulled his taser, and gave a verbal command for Stewart to drop the fanny pack and lie down on the ground. He then placed his taser on Stewart and told him that he was under arrest. Once Stewart complied with Sheriff Mayhugh's command,[29] he was placed under arrest "for interfering with a governmental operation and tampering with physical evidence."[30] Then Sheriff Mayhugh radioed for backup.[31]

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[26] McLevain was not under arrest at this time.

[27] Sheriff Mayhugh described the fanny pack as a purse a woman would wear around her waist.

[28] Sheriff Mayhugh did not describe exactly how Stewart was attempting to dispose of the evidence.

[29] Stewart was within six to eight feet of the four-wheeler at this time.

[30] See KRS 524.100.

[31] Deputy Jenkins testified that once he heard Sheriff Mayhugh radio for backup, he immediately came out of the house to assist him and that officers from the Pennyrile Narcotics Task Force, the Central City Police, and the Kentucky State Police arrived on the scene. He testified that he did not believe that these agencies had any knowledge of the arrest warrant to be served on Neal.

Sheriff Mayhugh testified that the fanny pack had a zipper, but it was not completely closed at the time Stewart dropped it on the ground and he could see a plastic bag in the corner of the fanny pack. After placing Stewart under arrest, Sheriff Mayhugh opened the fanny pack and discovered seven or eight individual packages of what appeared to be methamphetamine. Upon analysis by the state laboratory, the methamphetamine was found to weigh 33.9 ounces, with a street value of over $100,000.00. Various items of drug paraphernalia were also found inside the fanny pack, including a crack pipe and about 40 syringes. After finding the drugs and paraphernalia in the fanny pack, Sheriff Mayhugh ceased his search. However, a member of the Pennyrile Narcotics Task Force opened the backpack, which was on the four-wheeler, and found $10,800.00 in cash. There was nothing in plain view in the backpack at this time, however, it was within close proximity of Stewart at the time of the search.

Subsequently, pursuant to Sheriff Mayhugh’s orders, Deputy Jenkins obtained a search warrant, which authorized a search of the residence located at 220 McConnell Lane, any vehicles on the premises, and Stewart’s person for drugs, instrumentalities, paraphernalia, and other contraband

associated therewith.[32] According to the evidence log, except for 12 cans of starting fluid, there were no other items relating to the manufacture of methamphetamine, or any other items of drug paraphernalia, found on the premises. Sheriff Mayhugh testified that everything that was connected with methamphetamine, was in the backpack. Deputy Jenkins testified at trial that the surveillance camera and monitor found in McLevain's bedroom were turned on and aimed at the garage area.[33] McLevain was not apprehended that day, but turned himself in three or four days later.

On April 28, 2004, the trial court issued its findings and order denying the suppression motion, and stating that, pursuant to the arrest warrant for Neal, the officers had a legal right to be on McLevain's property and even though Sheriff Mayhugh may have had other motives for going to McLevain's residence that day, those motives did not override his legal right to be there. Because the backpack was on the four-wheeler at the time McLevain was operating it, the trial court concluded

[32] The items seized included 12 cans Thrust quick starting fluid, 1 CMC black powder pistol ser# 60045 double barrel gun, 1 CMC black powder pistol ser# 15881P four barrel gun, 2 micro talk walkie talkies, 1 3M breathing mask (in blue cooler), 1 MSA respirator with filters (in blue cooler), 1 head light (in blue cooler) 1 blue bag with miscellaneous change, 1 Ultrak surveillance camera with monitor, $10,800.00 cash (found in backpack), 2.6 lbs. of suspected methamphetamine (found in fanny pack), numerous plastic bags with suspected Meth residue, and paper bags which contained case, miscellaneous syringes, miscellaneous cloth and plastic bags, spoon with suspected residue, scale, knife, MSM powder, Quaker container with crack pipes, 1 Suzuki King Quad four-wheel ATV and 1 Kawasaki four-wheel ATV.

[33] Stewart claimed no ownership to the surveillance equipment.

that McLevain had standing to contest the search of the backpack and the fanny pack.[34] However, based on Stewart's proximity to the backpack at the time of his arrest, any items seized from the backpack were in his immediate control and subject to a warrantless search incident to a lawful arrest.

Prior to the jury trial held on June 8, 2004, the charges of possession of a controlled substance, receiving stolen property, possession of a handgun by a convicted felon and PFO I were dismissed. The charges of trafficking in a controlled substance and possession of drug paraphernalia second or subsequent offense were amended to remove the firearm enhancements. The jury found McLevain guilty of trafficking in

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[34] While we do not believe that it affects the outcome of this case, we disagree with the trial court that McLevain had standing to challenge the evidence found through the warrantless search, as he denied any ownership of the backpack. Although there is no Kentucky case directly on point, we are persuaded that an individual has standing to challenge the search of a motor vehicle even though he does not own that vehicle if he had permission from the owner to drive the vehicle. See Maysonet v. State of Texas, 91 S.W.3d 365, 374 (Tex.Ct.App. 2002)(citing Stine v. State, 787 S.W.2d 82, 85 (Tex.App.-Waco 1990))(noting defendant who had authority to test drive vehicles left for repairs at a car repair shop had standing to challenge the search of the car which he used to commit murder).

McLevain had permission from his nephew to drive the four-wheeler and the backpack was located thereon. If our inquiry ended here, we would have to conclude that McLevain had standing. However, we think it pivotal that McLevain disavowed ownership or possession of the four-wheeler. It is generally recognized that "disclaimer by a person of ownership of property results in an abandonment thereof or the loss of a reasonable expectation of privacy therein, so that such person cannot challenge a search or seizure" [footnotes omitted]. 79 C.J.S. Searches & Seizures Sec. 38 (2005). See People v. Exum, 74 N.E.2d 56 (Ill. 1943); and Bevans v. State, 24 A.2d 792 (Md.Ct.App. 1942). Under the facts of this case, we are of the opinion that McLevain abandoned any expectation of privacy in the four-wheeler by his disclaimer of possession thereof and thus, cannot challenge the constitutionality of the search of the backpack located thereon.

a controlled substance in the first degree, or by complicity with Stewart, and possession of drug paraphernalia second or subsequent offense, or by complicity with Stewart, and recommended a prison sentence of ten years on the trafficking conviction and five years on the conviction for possession of drug paraphernalia, to be served concurrently for a total of ten years in prison.[35] On June 28, 2004, the trial court sentenced McLevain to ten years in prison, in accordance with the jury's recommendation. This appeal followed.

SUPRESSION ISSUE

McLevain argues that the evidence obtained through Sheriff Mayhugh's warrantless search, i.e., the items found in the backpack, should be suppressed because the arrest of Neal was a pretext to the search. In the alternative, McLevain argues that even if the search was incident to arrest, it still violated the Fourth Amendment[36] and Section 10[37] of the Kentucky

[35] McLevain filed a motion for a new trial on June 16, 2004. However, nothing in the record on appeal indicates that the trial court ever ruled on McLevain's motion.

[36] The Fourth Amendment to the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[37] Section 10 of the Kentucky Constitution states as follows:

Constitution, both of which prohibit unreasonable searches and seizures, as it exceeded the consent McLevain gave to Sheriff Mayhugh to search the premises and exceeded the scope of a proper search incident to arrest.

Our standard of review for an order denying suppression of evidence is set forth in Commonwealth v. Neal,[38] as follows:

> An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law [citations omitted].

A factual finding by the trial court on McLevain's suppression motion cannot be overturned unless it is clearly erroneous and the burden is on McLevain to show that the trial court so

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> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

[38] 84 S.W.3d 920, 923 (Ky.App. 2002)

erred.[39] "[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[40] "However, the ultimate legal question of whether there was . . . probable cause to search is reviewed de novo."[41]

First, we must determine whether Sheriff Mayhugh was legally on the premises. A police officer can enter another's property for legitimate business.[42] It is undisputed that Sheriff Mayhugh and his deputies came to McLevain's home to serve a mental health arrest warrant on Neal.

McLevain argues that the mental health arrest warrant was only a pretext to the officers' being on the premises to look for drug activity. To determine the officers' real purpose, we must look at all facts and circumstances.[43] "An arrest may not be used as a pretext or subterfuge for making a search of premises without a search warrant where ordinarily one would be required under the Fourth Amendment" [footnote

[39] See Clark v. Commonwealth, 868 S.W.2d 101, 103 (Ky.App. 1993)(citing Harper v. Commonwealth, 694 S.W.2d 665, 668 (Ky. 1985); and RCr 9.78). See also Hughes v. Commonwealth, 87 S.W.3d 850, 852 (Ky. 2002).

[40] Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

[41] Commonwealth v. Banks, 68 S.W.3d 347, 349 (Ky. 2001)(citing Ornelas, 517 U.S. at 691).

[42] See Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964).

[43] United States v. Harris, 321 F.2d 739, 741 (6th Cir. 1963).

omitted].[44] Sheriff Mayhugh does not deny that he hoped to find evidence of drug activity while making the arrest of Neal; however, there is no evidence that Neal's arrest was invalid. Thus, the officers had a legitimate purpose for being on McLevain's property.

McLevain argues that since Neal was in the house, it was unnecessary for Sheriff Mayhugh to be outside around the garage. Accordingly, we must determine whether Sheriff Mayhugh went lawfully beyond McLevain's house to the garage near the house. At the time Sheriff Mayhugh approached McLevain and Stewart, they were just outside the garage which had an open door. Sheriff Mayhugh testified that he approached McLevain to inform him of his purpose for being on the premises and it is undisputed that he did so at that time. At that point, Sheriff Mayhugh smelled the odor of methamphetamine or related products. He then informed McLevain and Stewart that he had heard rumors of the drug trafficking at the residence. He then requested permission to search the area and McLevain gave his consent.

As Sheriff Mayhugh reached for the backpack located in the basket on the four-wheeler, McLevain told him that he would need a warrant to search the backpack. How much further Sheriff

[44] Harris, 321 F.2d at 741. To determine whether the trial court's denial of McLevain's suppression motion was proper, this Court must determine whether Sheriff Mayhugh's search of the backpack required a search warrant under the Fourth Amendment and Section 10 of the Kentucky Constitution. See also Estep v. Commonwealth, 663 S.W.2d 213, 215-16 (Ky. 1983).

Mayhugh went toward opening the backpack is disputed, but it is undisputed that he did not look inside the backpack at that time. Thus, at this point in the sequence of events, Sheriff Mayhugh was lawfully on the premises and had obtained consent prior to any search. When consent was withdrawn, Sheriff Mayhugh's search ceased until the arrest of Stewart.[45]

"In order for a warrantless search to be upheld, it must fall within one of four exceptions: (1) a consent search; (2) a plain view search; (3) a search incident to a lawful arrest; or, (4) a probable cause search" [citation omitted].[46] We conclude that all four of these exceptions apply to different aspects of this case.

While it is unclear at exactly what moment Sheriff Mayhugh smelled the odor coming from the backpack, the evidence indicates Sheriff Mayhugh had smelled the odor before attempting to open the backpack. While he did not do so, we conclude that Sheriff Mayhugh could have searched the backpack at that time based on his experience and qualifications to identify the smell of methamphetamine and its ingredients. Both the courts of this Commonwealth and the federal courts have recognized that a

[45] It has been the long-standing rule of this Commonwealth that consent to search without a warrant cannot be withdrawn once a search is in progress in order to conceal an illegality. See Smith v. Commonwealth, 197 Ky. 192, 246 S.W. 449 (Ky.App. 1923). Whether McLevain withdrew consent in this case is irrelevant, as Sheriff Mayhugh ceased his search based on consent at the time McLevain attempted to withdraw it.

[46] Richardson v. Commonwealth, 975 S.W.2d 932, 933 (Ky.App. 1998).

warrantless search can be based on an officer's sense of smell.[47] In Johnson v. United States,[48] the Supreme Court recognized that an officer's smell of the odor of illegal drugs can support a finding of probable cause if the officer is qualified to know, and identify the odor and the odor is "sufficiently distinctive to identify a forbidden substance[.]"[49]

"A police officer may make a warrantless arrest when the officer has reasonable grounds to believe a felony has been committed, and that the arrested individual committed the felony" [citations omitted].[50] Probable cause must exist at the time the officer makes the arrest, and does so if "the totality of the evidence . . . then known to the arresting officer creates a fair probability that the arrested person committed the felony" [citations omitted].[51] The smell Sheriff Mayhugh noticed coming from the backpack, McLevain's running from the seen, and Stewart's removal of the fanny pack and attempt to destroy the evidence constituted probable cause for Sheriff Mayhugh to believe, not only that Stewart and McLevain were

[47] See Cooper v. Commonwealth, 577 S.W.2d 34, 36 (Ky.App. 1979)(stating that "[t]he federal courts have also recognized a 'plain smell' analogue to the 'plain view' doctrine" [citations omitted]).

[48] 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

[49] Id. 333 U.S. at 13.

[50] Eldred v. Commonwealth, 906 S.W.2d 694, 705 (Ky. 1995).

[51] Id.

engaged in drug activity, but that Stewart was also attempting to remove or to destroy evidence of a crime.

However, at this point, there still was no search of the backpack. While McLevain's argument as to the validity of the search is based on the arrest of Neal, it must be considered along with the arrest of Stewart. The arrest of Neal is significant to the validity of the warrantless search of the backpack only to the extent that it established the lawful presence of Sheriff Mayhugh on the premises. The search of the backpack followed the arrest of Stewart for tampering with physical evidence and was a warrantless search, incident to the arrest of Stewart, not Neal, and was based on exigent circumstances. Therefore, we must determine if Stewart's arrest was bonafied before the warrantless search of the backpack.[52]

After Sheriff Mayhugh reached for the backpack and was informed that he could not search it without a warrant, McLevain began running away from the premises. As Sheriff Mayhugh ran after McLevain, Stewart opened the backpack and grabbed the fanny pack inside and began to flee with it.[53] It is unclear from the facts, but Sheriff Mayhugh gave undisputed testimony that he observed Stewart attempting to destroy the evidence in

[52] See Taglavore v. United States, 291 F.2d 262, 266 (9th Cir. 1961).

[53] There is no dispute that the fanny pack was initially located in the backpack prior to the warrantless search.

the fanny pack before he placed him under arrest for tampering with physical evidence. KRS 524.100 states as follows:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
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> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with the intent to impair its verity or availability in the official proceeding; . . .
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> (2) Tampering with physical evidence is a Class D felony [emphases added].

Clearly, there was sufficient grounds to arrest Stewart for tampering with evidence, and he was ultimately convicted of that offense. "When an arrest is made, it is reasonable for the arresting officer to search the person arrested . . . and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab . . . evidentiary items must . . . be governed by a like rule."[54] The items seized pursuant to the warrantless search were all within a few feet of Stewart, at the time of the arrest.

Further, the exigent circumstances exception to the

[54] Chimel v. California, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

warrantless search rule applies in this case. Sheriff Mayhugh had already detected the odor of methamphetamine coming from the backpack. After he witnessed Stewart attempting to tamper with items in the backpack, exigent circumstances existed for the warrantless search. "This need may be particularly compelling where narcotics are involved, for 'narcotics can be easily and quickly destroyed while a search is progressing.'"[55] Thus, we conclude that the Commonwealth met its burden of proof that exigent circumstances existed, and the search was incident to Stewart's arrest. Accordingly, Sheriff Mayhugh's warrantless search of the fanny pack and the backpack was based on probable cause, was conducted pursuant to the exigent circumstances exception,[56] and was conducted pursuant to the search incident to arrest exception to the warrant requirement.

MISTRIAL

McLevain next argues that the trial court abused its discretion in denying his motion for a mistrial after Sheriff Mayhugh testified, contrary to the trial court's pretrial ruling on McLevain's motion in limine, that he had heard rumors of drug activity at McLevain's residence. On direct examination, the Commonwealth asked Sheriff Mayhugh whether he had any further

[55] United States v. Sangineto-Miranda, 859 F.2d 1501, 1511 (6th Cir. 1988).

[56] Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky. 2003)(stating that the "[d]estruction of evidence is a recognized exigent circumstance creating an exception to the warrant requirement" [citations omitted]).

conversation with McLevain, on the date in question, after he informed him why he was on the premises. Sheriff Mayhugh answered, "Yes. I explained – I explained to [ ] McLevain that I had received a complaint on drug traffick and . . .". McLevain's attorney immediately moved for a mistrial. The trial judge denied the motion at that time, but stated that he would discuss the motion for a mistrial further at the next break. The trial court also offered to admonish the jury at that time, but McLevain's attorney declined the offer. Upon later conferring with the parties in chambers, the trial court again denied the motion for a mistrial. The trial judge acknowledged that McLevain was prejudiced by Sheriff Mayhugh's testimony, but stated that he did not believe it was intentional, nor that it prohibited McLevain from receiving a fair trial. Again, the trial court offered to admonish the jury, but McLevain's counsel declined the offer.

McLevain argues to this Court that Sheriff Mayhugh's statement was regarding prior bad acts, identical to the charges at issue, and inadmissible under KRE[57] 404[58] and was extremely

[57] Kentucky Rules of Evidence.

[58] KRE 404(b) and (c) states as follows:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

prejudicial. McLevain argues that the testimony gave an "impermissible aura of credibility to the charge" and that an admonishment would not have cured the error,[59] but rather would have further prejudiced him. The Commonwealth argues in opposition that Sheriff Mayhugh's testimony was an incomplete sentence and, given the facts that such a large quantity of methamphetamines and paraphernalia was found, McLevain's subsequent testimony as to the rumors, and his rejection of the trial court's offered admonition, the trial court properly refused to grant the mistrial.

> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
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> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.
>
> (c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

[59] See Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000).

A mistrial is an extreme remedy, and the refusal to grant such is within the discretion of the trial court.[60] A mistrial is only merited when "there is a fundamental defect in the proceedings and there is a 'manifest necessity for such an action'" [footnote omitted].[61] Only upon a showing of abuse of discretion, can this Court intervene.[62] "'The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles.'"[63] "'The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way'" [footnote omitted].[64]

At two separate points in the proceedings, the trial court offered to admonish the jury. Both offers were declined. There is a presumption that "a jury will follow an admonition to disregard evidence and an admonition will cure an error"; however, the presumption can be rebutted by looking at two factors as follows:

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[60] Woodard v. Commonwealth, 147 S.W.3d 63, 68 (Ky. 2004).

[61] Id.

[62] Bray v. Commonwealth, 68 S.W.3d 375, 383 (Ky. 2002); Woodard, 147 S.W.3d at 67.

[63] Woodard, 147 S.W.3d at 67 (quoting Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000)(citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999))).

[64] Woodward, 147 S.W.3d at 68.

> (1) [W]hen there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant . . . or (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial" [citations omitted] [emphasis original].[65]

We conclude that McLevain has not rebutted the presumption that an admonishment would have cured the error. First, Sheriff Mayhugh's impermissible testimony was stopped mid-sentence, and we are confident that a jury could have followed an admonition from the trial court to disregard the testimony. Second, the question which brought forth the impermissible testimony was relevant, and the Commonwealth had a factual basis for asking Sheriff Mayhugh what he discussed with McLevain when he was on the premises on the date in question. Thus, since the presumption was not rebutted, we conclude an admonishment would have been proper. McLevain's declining of the trial court's offers negates the justification for a mistrial, as there were other remedies to cure the prejudicial effect of Sheriff Mayhugh's statement. We conclude that the trial court did not abuse its discretion in denying the mistrial. There was no manifest necessity for a mistrial in

[65] Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003).

this case, and the trial court's decision was not arbitrary or unfair.

DIRECTED VERDICT

McLevain was convicted of trafficking in a controlled substance or complicity to do so with Stewart, and possession of drug paraphernalia, second or subsequent offense or complicity to do so with Stewart. McLevain argues that the trial court erred in denying his motion for a directed verdict of acquittal[66] as there was insufficient evidence to support a conviction on either charge. Our Supreme Court stated the rule for a directed verdict of acquittal in Commonwealth v. Benham,[67] as follows:

> "On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony."
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the

[66] Cutrer v. Commonwealth, 697 S.W.2d 156, 158-59 (Ky.App. 1985)(stating that "[t]here is no criminal rule in Kentucky dealing with directed verdicts as such, but RCr 13.04 imports the Civil Rules into criminal proceedings to the extent that they are not superceded by or inconsistent with the criminal rules").

[67] 816 S.W.2d 186 (Ky. 1991).

> defendant is entitled to a directed verdict of acquittal [citation omitted].[68]

McLevain argues that there was no more than a "mere scintilla of evidence"[69] presented that he was involved in any way with the drugs and paraphernalia found in the backpack. He argues that there was no evidence of actual possession or actual knowledge, only constructive possession based on circumstantial evidence, and thus, insufficient evidence for a jury to reasonably find him guilty of the crimes that he was alleged to have committed. We disagree and hold that the evidence presented by the Commonwealth at trial was sufficient to meet the elements of the charges for which McLevain was convicted.

After the trial court denied McLevain's motion for a directed verdict of acquittal at the close of the Commonwealth's evidence, he presented evidence on his own behalf, including taking the stand and testifying himself. "[I]f a party chooses to proceed with his case after the motion is denied, he assumes the risk that his evidence will fill the gaps in his opponent's case, forfeiting his claim of error. . . . '[A]n error in denying such a motion at the close of the plaintiff's evidence is held to be cured when the defendant by his subsequent testimony has supplied the omission

[68] Benham, 816 S.W.2d at 187.

[69] Id. at 188.

in the plaintiff's case'" [citations omitted].[70] In viewing the evidence as a whole, we conclude that it was not unreasonable for the jury to find McLevain guilty of the charges.

A conviction for trafficking in a controlled substance in the first degree requires that a defendant "knowingly and unlawfully traffics in: . . . a controlled substance that contains any quantity of methamphetamine[.]"[71] "Traffic . . . means . . . to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance."[72] Under Kentucky law, methamphetamine is a controlled substance.[73] Possession of drug paraphernalia, second or subsequent offense, requires proof that the defendant possessed drug paraphernalia,[74] with the intent use it for a purpose in violation of KRS 218A.[75] McLevain was found to be in complicity with Stewart under KRS 502.020[76] on both convictions. "Intentionally" is defined as

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[70] Cutrer, 697 S.W.2d at 159.

[71] KRS 218A.1412

[72] KRS 218A.010(28).

[73] KRS 218A.010(4). See Johnson, 105 S.W.3d at 444.

[74] KRS 218A.500(1)(noting that drug paraphernalia means equipment, products, and materials of any kind).

[75] KRS 218A.500(2).

[76] KRS 502.020 states as follows:

> (1) A person is guilty of an offense committed by another person when, with the intention of

"conscious objective [ ] to cause that result or to engage in that conduct."[77] "Knowingly" is defined as being "aware that [ ] conduct is of that nature or that the circumstances exists."[78]

For conviction of either crime, proof of possession and intent are required. This must be a "'knowing possession'" [citations omitted].[79] McLevain argues that he could not have possessed the items found in the backpack because he did not own

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promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

(c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient of the commission of the offense is guilty of that offense when he:

(a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or

(b) Aids, counsels, or attempts to aid another person in planning or engaging in the conduct causing such result; or

(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

[77] KRS 501.020(1).

[78] KRS 501.020(2).

[79] United States v. Pardo, 636 F.2d 535, 548 (D.C.Cir. 1980).

the backpack or the four-wheeler upon which the backpack was found and could not have intended to commit the crimes because he did not know what was in the backpack. However, he did testify "I know [Stewart]" and stated that he was afraid of what might be in the backpack. McLevain argues that the Commonwealth must prove that he took an affirmative action in order to establish dominion and control, not mere proximity to the backpack.[80]

First, we must determine if McLevain possessed the drug evidence in the backpack, including the methamphetamine, paraphernalia, and the cash. The Commonwealth has the burden to prove McLevain had possession of the methamphetamine and other drug related evidence.[81] Our Supreme Court in Pate held that the definition of "possession" as set out in the Kentucky Penal Code[82] does not apply to offenses set out in KRS Chapter 218A.[83] Rather, our Supreme Court stated as follows:

> KRS Chapter 218A does not define "possess" or any of its cognate forms. Consequently we employ the common meaning of "possess." The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.2000) defines "possess" as "[t]o have as property; own."

[80] United States v. Byfield, 928 F.2d 1163, 1166 (D.C.Cir. 1991); Pardo, 636 F.2d at 549.

[81] Pate v. Commonwealth, 134 S.W.3d 593, 598-99 (Ky. 2004).

[82] KRS 500.080(14) defines possession as having "actual physical possession or otherwise to exercise actual dominion or control over a tangible object[.]"

[83] Pate, 134 S.W.3d at 598.

> In other words, if a person owns[,] he possesses.[84]

"[O]wnership and control of [a] vehicle is only one factor to consider . . ." in determining possession of the contraband.[85] Possession can also be constructive.[86] "It is rare that drugs are found in the 'actual' possession of the defendant; in nearly all cases the question is whether the Government has sufficiently proven that the defendant was in 'constructive' possession of the drugs."[87] "To prove constructive possession, the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control" [citations omitted].[88] It must be determined whether McLevain "knew that he had a right to exercise some control over the narcotics."[89] Determining this knowing possession is "obviously a difficult question of fact, which will nearly always turn on circumstantial evidence."[90] Thus, the issue must

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[84] Pate, 134 S.W.3d at 598.

[85] Burnett v. Commonwealth, 31 S.W.3d 878, 881 (Ky. 2000).

[86] Pate, 134 S.W.3d at 598.

[87] Id.

[88] Burnett, 31 S.W.3d at 881.

[89] Pardo, 636 F.2d at 548.

[90] Id.

often be "resolved by the jury, after hearing all of the evidence and considering all of the inferences therefrom."[91]

We agree with McLevain that there must be something more than mere presence at the scene of a drug transaction, or that he was "merely an innocent bystander."[92] "The essential question is whether there is 'some action, some word, or some conduct that links the individual to the narcotics and indicates that he had some stake in them, some power over them'" [citations omitted].[93] As long as the defendant has a "high degree of control," the control need not be "exclusive" [citations omitted].[94] "[P]roof that a defendant has possession and control of a vehicle is evidence to support a conviction for constructive possession of contraband found within the vehicle."[95] Based on the evidence presented, it was reasonable

[91] Pardo, 636 F.2d at 548.

[92] Id. at 549.

[93] Byfield, 928 F.2d at 1166.

[94] Pate, 134 S.W.3d at 599. See Houston v. Commonwealth, 975 S.W.2d 925, 927 (Ky. 1998)(stating that "Kentucky courts have continued to utilize the constructive possession concept to connect defendants to illegal drugs and contraband"); see also Franklin v. Commonwealth, 490 S.W.2d 148, 150 (Ky. 1972)(stating that "[t]wo or more persons may be in possession of the same drug at the same time and this possession does not necessarily have to be actual physical possession. It may be constructive as well as actual").

[95] Burnett, 31 S.W.3d at 880 (citing Leavell v. Commonwealth, 737 S.W.3d 695 (Ky. 1987)).

for a jury to conclude that McLevain possessed the drugs and the paraphernalia located in backpack.[96]

Both crimes also required proof of McLevain's intent, i.e., his intent to distribute the methamphetamine that he possessed and his intent to possess the items of drug paraphernalia in the backpack. "'[T]he jury is allowed reasonable latitude in which to infer intent from the facts and circumstances surrounding the crime.'" [footnote omitted].[97] Further, "[i]ssues of credibility are solely within the purview of the finder of fact and a reviewing court will not substitute its judgment for the jury's on such matters."[98] McLevain testified that he had no knowledge of what was in the backpack. Knowledge can be from direct proof or a strong inference of knowledge.[99]

McLevain denied smelling any odor coming from the backpack, even though he testified to his close proximity to the backpack and despite his prior convictions of possessing methamphetamine. Sheriff Mayhugh testified that there was in

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[96] McLevain argues that Stewart was the only one who touched the backpack. He also argues that Sheriff Mayhugh should have checked the backpack and its contents for fingerprints and had he done so, he would have found none matching McLevain's fingerprints, thus negating his possession of the items in the backpack. This is irrelevant as we find sufficient evidence that the backpack was in McLevain's dominion and control.

[97] Pate, 134 S.W.3d at 599.

[98] Id.

[99] Franklin, 490 S.W.2d at 150.

fact an odor coming from the backpack and that he was familiar with the odor of methamphetamine based on his training and experience. The fact that Sheriff Mayhugh, a qualified officer, testified to the odor, and upon a proper warrantless search found a large amount of methamphetamine in the backpack,[100] a reasonable jury could infer that those in close proximity to the bag would have smelled the odor. The jury could have reasonably found McLevain's intent through his erratic behavior of running from the scene after Sheriff Mayhugh's attempt to look inside the backpack and his moving of the four-wheeler into the garage upon seeing Sheriff Mayhugh, after parking it initially outside. Further, once it was determined that McLevain had possession of the paraphernalia, the fact that it was found in the fanny pack with the drugs could lead a jury to reasonably believe that the paraphernalia was to be used to ingest a controlled substances. These facts combined with the conclusion that McLevain constructively possessed the backpack, make the jury's finding of intent reasonable.

We further conclude that a reasonable juror could infer that McLevain and Stewart were in complicity with one another to commit the crimes for which they were convicted. McLevain and Stewart were neighbors and family. Stewart was convicted of both trafficking methamphetamine and possession of

[100] Franklin, 490 S.W.2d at 150.

drug paraphernalia. While Stewart adamantly testified that the backpack and its contents belonged to him, the jury heard evidence that the backpack was also in possession of McLevain. The jury as fact-finder has the authority to determine the credibility of witnesses and to rely on the evidence as it feels is necessary. The fact that Stewart allowed McLevain to have ultimate control over the four-wheeler containing over $100,000.00 worth of methamphetamine, and over $10,000.00 in cash could lead a reasonable jury to believe there was complicity between Stewart and McLevain and that McLevain intended to aid Stewart in the endeavor and would allow the jury to easily reject McLevain's assertion that he was riding the four-wheeler simply to repair it.

KRS 502.020 does not require a person to be present at the scene to find him guilty of trafficking or possession of drug paraphernalia, or complicity of either crime as long as it is proven that he possessed the drug evidence. McLevain was found to have possession of the items in the backpack and intent to possess them. It is evident that the totality of the circumstances presented in this record affords fair and reasonable grounds to support the verdict of the jury. In these circumstances, the evidence is sufficient.[101]

[101] See Rupard v. Commonwealth, 475 S.W.2d 473, 476 (Ky. 1971).

For the foregoing reasons, the judgment and conviction of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

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