RENDERED: MAY 25, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001086-MR

JACKIE R. MARCUM — APPELLANT

v.

APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 03-CR-00069

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: On October 18, 2004, Jackie R. Marcum (hereinafter referred to as "Marcum") entered a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 in the Jackson Circuit Court to the amended charge of manufacturing methamphetamine in the first degree.[1] Pursuant to the terms of his

[1] Marcum was originally charged with manufacturing methamphetamine in the first degree, Kentucky Revised Statutes (KRS) 218A.1432, trafficking in controlled substance in the first degree, KRS 218A.1412, possession of controlled substance in the first degree, KRS 218A.1415, unlawful possession of a methamphetamine precursor, KRS 218A.1437, wanton endangerment in the first degree, KRS 508.060, and possession of marijuana, KRS 218A.1422. Pursuant to the

conditional guilty plea agreement, Marcum was sentenced to ten years' imprisonment, while reserving his right to appeal the issues raised in relation to the trial court's denial of his various motions to suppress evidence and to dismiss the criminal charges lodged against him. This appeal arises from the Jackson Circuit Court's denial of these various motions. For the following reasons, we affirm.

On August 19, 2003, Jackson County Sheriff Tim Fee was near Marcum's property when he detected the odor of ether, a chemical known by law enforcement to be associated with the manufacture of methamphetamine, and observed Marcum moving between his residence and an outbuilding described as a "chicken house." From his vantage point, Sheriff Fee could see lye, a cooler, a fuel can, and a "gas generator,"[2] which further raised his suspicion of illicit substances being manufactured on the property. Sheriff Fee departed the area, but returned later that evening accompanied by two other officers who also recognized the odor of ether and observed the previously described suspicious items located in plain view on Marcum's property. Based on their education, training, and experience in law enforcement, and based on the recognized odor

---

plea negotiations, Marcum was to enter a conditional guilty plea to the manufacturing methamphetamine charge, and the remaining charges were to be dismissed.

[2] The "gas generator" referenced by the Commonwealth is not, as the term is commonly used, an apparatus used to generate electricity using a gasoline powered internal combustion engine. References by Marcum to the generator located on his property as such are erroneous. Here, the term is referring to an apparatus used to capture the vapors generated from a simple chemical reaction. These vapors are to be used and processed further to manufacture quantities of anhydrous ammonia, or a substitute therefor, which is an essential chemical used in the manufacture of methamphetamine. In the instant case, the apparatus consisted of a plastic gas can and a length of rubber tubing. Perhaps this item would be better designated as a "chemical vapor generator" in order to reduce confusion.

of ether and the suspicious items they observed, these officers agreed with Sheriff Fee's conclusion that methamphetamine was being manufactured on Marcum's property.

The following day, August 20, 2003, Sheriff Fee obtained a search warrant for Marcum's property from a trial commissioner. The search warrant was based on a supporting affidavit prepared by Sheriff Fee. Upon execution, law enforcement officers found all necessary equipment and most chemicals required for the manufacture of methamphetamine. As a result of the items seized from his property, Marcum was arrested and charged later that afternoon. A Jackson County grand jury returned a multi-count indictment against Marcum on September 2, 2003, charging him with manufacturing methamphetamine in the first degree, trafficking in controlled substance in the first degree, possession of controlled substance in the first degree, unlawful possession of a methamphetamine precursor, wanton endangerment in the first degree, and possession of marijuana.

On October 7, 2003, some 48 days after the search of his property, Marcum filed a motion to suppress all evidence seized pursuant to the search warrant based upon a delay in filing the warrant return. The return was filed with the trial court the next day, October 8, 2003, along with a listing of the equipment and chemicals which were obtained during the raid. The trial court denied Marcum's motion on October 14, 2003.[3]

Shortly after the search warrant was executed, several items seized from Marcum's property were disposed of by law enforcement in normal refuse containers. On

[3] The denial of this suppression motion is not before us on this appeal.

or about December 16, 2003, numerous other items seized during execution of the search warrant were sent to an incinerator for destruction as they allegedly represented contaminated and/or hazardous materials.[4] Prior to destruction, law enforcement officials obtained samples from some, but not all, of the seized items for analysis and testing. Marcum was not advised of the intended destruction, nor was he granted an opportunity to examine, sample, or test any of the items prior to their destruction.

On February 25, 2004, Marcum filed separate motions to compel discovery, to inspect certain items identified on a "trash list" filed with the search warrant return, to suppress all evidence seized as a result of the search warrant based upon Marcum's allegation that information contained in Sheriff Fee's supporting affidavit had been illegally obtained, and to suppress all of the evidence seized as a result of the search warrant based upon Marcum's allegation that the search exceeded the scope of the search warrant. A hearing was held concerning these motions on March 2, 2004, wherein the trial court granted the motions to compel discovery and to inspect the seized items, but passed consideration of the two motions to suppress to a later date.[5]

[4] A review of the record indicates the liquid materials and their containers were packaged and sent to an incinerator for destruction, while the solid hazardous waste was placed in garbage bags and placed with normal refuse for collection and disposition. Some testimony was given that these actions were taken pursuant to the Kentucky State Police's written policy regarding destruction of contaminated materials. The record does not contain verification or documentation of this policy, although it appears the circuit court was satisfied such a policy exists.

[5] Both Marcum and the Commonwealth speculate that another hearing was held on April 6, 2004, wherein the trial court ruled upon some unknown motions. The only indication in the record on appeal that such hearing occurred, what issues were presented at such hearing, and the outcome of such proceedings, is a copy of the docket sheet from that date with some hand-written notes inscribed thereon. There is no recording, video or audio, or transcript of such proceedings included in the record, and the hand-written notes are not instructive. We must

On April 28, 2004, Marcum filed a motion to compel further discovery and a motion to dismiss the trafficking and possession of marijuana charges of the indictment. The trial court granted Marcum's motion to compel, denied his motion to dismiss the trafficking charge, and passed consideration of his motion to dismiss the marijuana charge to a later date.

On June 15, 2004, a hearing was held on several oral motions, including a demand by Marcum's counsel that all remaining charges be dismissed based upon the Commonwealth's deliberate destruction of evidence; or alternatively, to suppress all evidence related to the destroyed evidence; or alternatively, to grant him a missing evidence instruction. The trial court heard testimony from two law enforcement officers, received further evidence from both parties, and heard arguments from counsel concerning the destruction of items seized from Marcum's property pursuant to the search warrant. At the conclusion of the hearing, the trial court denied Marcum's motions to dismiss and suppress, but reserved ruling on his request for a missing evidence instruction until the time of trial.

On October 18, 2004, the date set for a jury trial of these matters, Marcum entered a negotiated guilty plea to the charge of manufacturing methamphetamine in the first degree. Marcum's guilty plea was conditionally made, reserving his right to appeal the denial of his pre-trial suppression motions. Final sentencing occurred on January 18,

---

therefore conclude that the trial court's rulings from this hearing, if any, were correct. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). We further note that Marcum's counsel later affirmatively denied that such a hearing occurred. In any case, any issues which may have been presented on that occasion are not properly before us on appeal, and we therefore disregard any arguments based thereon as they are not properly before us.

2005. Consistent with the negotiated plea agreement, the trial court sentenced Marcum to serve ten years in prison for the offense of manufacturing methamphetamine in the first degree, with the other charges in the indictment being dismissed. This appeal ensued.

I. DESTRUCTION OF EVIDENCE

Marcum first contends the trial court erred in denying his motions to dismiss and suppress based on the Commonwealth's deliberate destruction of evidence, thereby arguably denying his rights under the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution as well as Sections 2, 3, and 11 of the Kentucky Constitution. Marcum argues the Commonwealth's destruction of some of the seized evidence prior to his having an opportunity to inspect, sample, or test the items was fatal to its maintaining charges against him. Furthermore, he argues this destruction robbed him of any reasonable opportunity to cross-examine persons who tested the items on behalf of the Commonwealth. For the following reasons, we reject Marcum's arguments.

In cases dealing with the destruction of evidence, the Supreme Court of Kentucky has held "the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed." *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). Furthermore, in *Collins v. Commonwealth*, 951 S.W.2d 569, 572 (Ky. 1997), the Supreme Court of Kentucky adopted the ruling of *Arizona v. Youngblood*, 488 U.S. 51, 57-8, 109 S.Ct. 333, 102

L.Ed.2d 281 (1988), holding there is no denial of Due Process absent a showing of bad faith on the part of law enforcement or the Commonwealth in their failure "to preserve evidentiary material of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant. . . ."

There is no argument that several items collected from Marcum's property pursuant to the search warrant were intentionally destroyed by law enforcement officials without the benefit of any reference sampling, analysis, or testing. However, a list of these items, together with photographs of each item, was prepared and later provided by the Commonwealth to Marcum during the course of discovery. While better practice would have required such reference sampling, analysis, or testing by the Commonwealth, or notice to Marcum of its intent to destroy the items with a reasonable opportunity for him to perform his own inspection, analysis or testing, if desired, based on the facts before us in this case, we find no evidence of bad faith on the part of law enforcement, nor do we find any showing that the evidence destroyed held obvious potentially exculpatory value evident at the time of destruction.

Trooper Michael Martin, the Kentucky State Police (KSP) detective in charge of disassembling the equipment found on Marcum's property, testified at the June 15, 2004, hearing regarding a written KSP policy[6] dealing with the routine destruction of

[6] A review of the transcript from the June 15, 2004, hearing reveals an intention by all parties to have a copy of the policy faxed to the trial court for its review and for inclusion in the record. However, for unknown reasons, the policy was never made a part of the record. Therefore, we are left only with Detective Martin's uncontroverted testimony regarding the existence and substance of this policy which we must accept as true. While we would have preferred to have had a copy of the official policy included in the record for our review and for efficiency of judicial effort, the lack thereof does not change our view of the evidence presented.

potentially hazardous materials. According to this KSP policy, Detective Martin explained suspected contaminated materials, including empty cans, are to be disposed of almost immediately after seizure and cataloging, with the directive that such items are to be packaged in double-lined plastic waste bags prior to being placed in solid waste disposal containers. Detective Martin explained that hazardous items, including unknown or unidentified liquids and suspected hazardous solids, are to be placed into a secured trailer maintained at KSP headquarters for the limited purpose of short-term holding of such items prior to their ultimate removal and destruction. He testified that the hazardous materials trailer was routinely emptied every few days or weeks after collecting up to 220 pounds of such items. Detective Martin testified that none of the items seized during the raid and subsequently destroyed had any patent exculpatory value, but rather that all such items seized were consistent with evidence pertaining to other methamphetamine lab investigations he had worked.

In light of Detective Martin's uncontradicted testimony, we find no error on the part of the trial court in overruling Marcum's request for suppression of evidence or dismissal of the charges against him. Detective Martin's cataloging, photographing, and destruction of the hazardous or potentially hazardous items recovered in relation to suspected methamphetamine lab investigations were consistent with KSP policy. While recognizing our primary concern that such policies adhere to the accused's federal and state constitutional rights, we also note such policies are necessary to ensure the safety of law enforcement officials. Contrary to Marcum's argument, there was no showing that

the Commonwealth "rushed" to destroy this evidence after the trial court entered a discovery order on November 7, 2003. The items were destroyed on or about December 16, 2003, in the normal course of business for KSP's investigation of suspected methamphetamine labs. While the items destroyed could have been subjected to testing, there is nothing in the record to indicate that the results of such testing might have exonerated Marcum, particularly in light of the totality of the evidence against him. *Youngblood,* 488 U.S. at 57-8. Marcum has failed to show that these hazardous items evidenced any exonerating value to the law enforcement officials at the time they were seized, cataloged, and destroyed. The trial court found no bad faith on the part of law enforcement, and we find nothing in the record to reasonably contradict the trial court's conclusion. Thus, we reject Marcum's argument regarding any violation of his Due Process rights.

II. MISSING EVIDENCE INSTRUCTION

In the event the charges against him were not dismissed or the allegedly tainted evidence was not suppressed, Marcum argued alternatively that he was entitled to a missing evidence instruction pursuant to *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988). When ruling on Marcum's final suppression motion, the trial court indicated a high likelihood that it would issue a missing evidence instruction at trial. In fact, Marcum included such a directive in the jury instructions he tendered immediately prior to the scheduled trial and prior to his acceptance of the negotiated guilty plea agreement. Such an instruction would have allowed the jury to draw inferences from the missing

evidence in favor of Marcum and against the Commonwealth, thus turning the evidence in Marcum's favor, and providing "more than the process due." *See Collins*, 951 S.W.2d at 573. However, because of Marcum's subsequent guilty plea, we need not comment further regarding his persuasive arguments regarding his entitlement to a missing evidence instruction based on the destruction of the alleged hazardous items by law enforcement officials. Clearly, agents of the Commonwealth should exercise extreme caution when electing to destroy alleged hazardous items seized during criminal investigations prior to trial, and should, in good faith, attempt to provide reasonable notice of such an intention to the accused, and afford the accused a reasonable opportunity to inspect, sample, or test such items prior to their destruction when the circumstances of a particular case make such notice and opportunity possible.

III. SEARCH WARRANT

Marcum next contends the trial court erred in denying his motions to dismiss and suppress based upon irregularities in the issuance and return of the search warrant. Marcum first argues that Sheriff Fee intentionally avoided the common-law knock-and-announce rule[7] when performing his initial investigation. In his brief,

[7] The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution protect citizens against unreasonable searches and seizures. In *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), the United States Supreme Court held that the Fourth Amendment incorporates the common law requirement that police officers must knock on the door and announce their identity and purpose prior to attempting to forcibly enter a dwelling. Further, the Court held this requirement to have three purposes: (1) to protect law enforcement officers and the occupants of the residence from possible violence; (2) to prevent the destruction of private property; and (3) to protect people from unnecessary intrusion into their private activities. This holding was cited favorably by the Supreme Court of Kentucky in *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998), and is therefore the law of this Commonwealth.

Marcum describes at great length his reasons for believing Sheriff Fee violated this rule, including arguments that Sheriff Fee must have been present on Marcum's property at the time he observed the offending items as it would have been impossible to see them otherwise, and that Sheriff Fee intentionally failed to announce his presence when he arrived on the property.[8] Marcum concedes this issue is unpreserved for review, but urges us to consider this issue as palpable error pursuant to RCr 10.26. Having thoroughly reviewed Marcum's argument and the record, we find no such error. Further, since there was no opportunity for the trial court to rule on this issue, we will not undertake a review of it for the first time upon appeal. *See Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000); *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998); and *Hopewell v. Commonwealth*, 641 S.W.2d 744, 745 (Ky. 1982).

Marcum further argues the trial court erred in denying his motion to suppress all evidence seized based on his contention that the information set forth in Sheriff Fee's affidavit in support of issuance of the search warrant could have been obtained or observed by Sheriff Fee and the other two law enforcement officers on August 19, 2003, only by unlawfully entering upon Marcum's property. Marcum argues the search warrant was unlawfully obtained based upon the tainted information given in the affidavit, and the trial court erred in not so finding. A careful review of the record reveals no evidence to support Marcum's allegation, and no indication this issue was preserved for appellate review. We therefore reject this argument.

[8] Marcum spends fully half of his brief reciting isolated facts and drawing inferences intended to bolster this argument. However, the inferences and arguments made are devoid of references to supporting evidence contained within the record on appeal.

Although Marcum made numerous independent motions to suppress evidence and/or to dismiss the charges against him, advancing different legal theories in support of each motion, our review of the record indicates the trial court made a ruling on June 15, 2004, in which it denied Marcum's motion to suppress based on the Commonwealth's destruction of evidence. We find no indication of any other rulings from the trial court regarding issues of suppression. RCr 8.09 allows for the appeal of the "adverse determination of any specified trial or pretrial motion." Marcum alleges the recitation contained in the Commonwealth's Offer on Guilty Plea stating that he reserves the right to appeal "any and all other pretrial motions to suppress" is sufficient to preserve the issues raised in all of his pretrial motions to suppress evidence or dismiss charges, even those upon which the trial court did not rule. We disagree.

Nothing in the record indicates the trial court ever made a final ruling on Marcum's motions for suppression except for the June 15, 2004, denial. We find nothing indicating Marcum ever requested additional rulings on his remaining motions. Thus, no adverse determinations were ever entered by the trial court for us to review on appeal pursuant to RCr 8.09. The mere assertion by the parties during plea negotiations that an issue is preserved is insufficient. The fact that Marcum relied upon this agreement is also insufficient. Appellate review requires a record establishing an actual or alleged error. The Supreme Court of Kentucky has held appellate courts "will not entertain [an] appellant's claim of error when supported only by a motion and an order." *Davis v. Commonwealth*, 795 S.W.2d 942, 949 (Ky. 1990). Here, we have no order, only a

motion, and that is wholly insufficient to preserve the matter for review. Because Marcum's argument was not preserved for appellate review, we find no merit in his allegation of error.

For the foregoing reasons, the judgment and sentence of the Jackson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky