

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000998-MR

JIMMIE HAWKINS, SR.

APPELLANT

v. APPEAL FROM ANDERSON CIRCUIT COURT  
HONORABLE CHARLES R. HICKMAN, JUDGE  
ACTION NO. 07-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING  
AND REMANDING

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BEFORE: KELLER AND THOMPSON, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

THOMPSON, JUDGE: Jimmie Hawkins, Sr. appeals from a judgment of conviction of the Anderson Circuit Court for possession of methamphetamine precursor and possession of drug paraphernalia. For the reasons stated below, we reverse and remand for a new trial.

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<sup>1</sup> Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On July 15, 2007, Mercer County Deputy Sheriff Rick Moberly received an anonymous phone call about the possibility of illegal drug activity at a trailer on or near Alford Road. The next day, while looking for the property, Deputy Moberly and Kentucky State Trooper Mike Rogers observed a red pickup truck parked along side the road on Cheese Lick Road in Anderson County. After stopping to assist the driver, police were informed that the driver's girlfriend was inside of a trailer near the roadway and the driver was concerned for her safety.

Based on the driver's concern, police decided to check on the driver's girlfriend's well-being. Trooper Rogers knocked on the trailer's front door but received no response. Deputy Moberly walked to the back of the trailer and knocked on the back door but received no answer. He then thought that he heard voices emanating from a camper. Around this time, Trooper Rogers observed two large dogs exit a nearby barn and decided to see what was in the barn.

Upon entering the barn, Trooper Rogers observed a jar with clear liquid and lithium stripes and an altered aluminum kettle containing tubing. He recognized the items as components used in the manufacture of methamphetamine. He then left to obtain a search warrant and returned where he observed Hawkins speaking with officers who had remained to secure the scene. Police later executed the search warrant on Hawkins's trailer, camper, and barn.

Upon searching, police discovered two glass pipes, a blue bag, and a black garbage bag. The blue bag contained digital scales and plastic baggies. The

black bag contained a clear jug, black rubber gloves, a carburetor cleaner aerosol can, lithium batteries, and two pill bottles containing white powder. The white powder in the bottles later tested positive for pseudoephedrine. After further searching, police discovered liquid fire, acetone, and ice cream salt.

As a result of the search, Hawkins, who had arrived before the search of his property, was arrested. On October 16, 2007, Hawkins was indicted for manufacturing methamphetamine, trafficking in a controlled substance in the first degree, and possession of drug paraphernalia. Subsequently, Hawkins filed a motion to suppress the evidence from the search of his property. He argued that police illegally entered his barn where they found items to establish probable cause to support the issuance of the search warrant. After conducting a hearing, the trial court denied Hawkins's motion, finding that police had exigent circumstances to enter the barn because of their investigation of the girlfriend's well-being.

Following a jury trial, Hawkins was found guilty of possession of methamphetamine precursor and possession of drug paraphernalia and sentenced to three years' imprisonment. This appeal followed.

Hawkins contends that the trial court erred by not suppressing the evidence from the search of his property in violation of his rights under the Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution. Specifically, he contends that police failed to establish that they had both probable cause and exigent circumstances to permit their entry into the barn.

Thus, Hawkins contends that the evidence observed from their illegal entry could not be the basis for issuance of a search warrant.

Our standard of review of a trial court's ruling on a motion to suppress requires that we first decide if the trial court's findings of fact are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). If supported by substantial evidence, the trial court's factual findings are conclusive and will not be disturbed by an appellate court. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006). A *de novo* review of the trial court's application of law is then conducted to determine whether it correctly applied the law. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). Because the parties do not dispute the trial court's findings, we deem them conclusive.

Both the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution guarantee the right to be free from unreasonable searches and seizures, which is effectuated by the general rule prohibiting searches not authorized by a valid search warrant. *Commonwealth v. Wood*, 14 S.W.3d 557, 558 (Ky.App. 1999). However, a few exceptions have evolved to permit limited uses of warrantless entries and searches. *Id.* One such exception, the emergency exigent exception, permits police to initiate a warrantless entry and search when they reasonably believe that a person within is in need of immediate aid. *Todd v. Commonwealth*, 716 S.W.2d 242, 247-48 (Ky. 1986).

At the suppression hearing, according to Trooper Rogers's testimony, he observed a truck parked along the side of the road. The driver informed him

that he was waiting for his girlfriend who was not responding to his calls to her cell phone. The driver informed him that his girlfriend was supposed to meet him at a specific time but she had not arrived. The driver had met her there on numerous occasions and was concerned for his girlfriend's well-being. The driver stated that his girlfriend was in the trailer but he did not know anything about the trailer. The driver pointed toward the trailer which was visible from the road.

After knocking on the front door, Trooper Rogers observed two large dogs exit an open barn with no doors. After approaching and entering the barn, he observed what he believed to be contraband. He then left the scene to obtain a search warrant. Based on these facts, the trial court found that police entered the property based on a reasonable belief that the girlfriend was physically injured or being held against her will. Thus, the trial court found that the emergency exigent exception permitted the warrantless entry of the barn.

Applying our legal standard, we conclude that the trial court committed error by denying Hawkins's motion to suppress. The facts establish that police were informed that a woman was in a trailer approximately 150 yards away, had not arrived to be picked up, and was not responding to cell phone calls. The driver believed that his girlfriend's safety was in doubt. While these facts justified the police's search of the trailer under the emergency exigent exception, their search of the barn went beyond the permissible scope of the emergency exigent exception permitting the trailer's search.

When searching a building under the emergency exigent exception, police must have an objectively reasonable basis for believing that a person within the building is in need of immediate aid. *Michigan v. Fisher*, 558 U.S. ----, 130 S.Ct. 546, 548, 175 L.Ed.2d 410 (2009). As stated in *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290 (1978), a warrantless search is strictly circumscribed by the exigencies which justified its initiation.

Under the facts of this case, police had no objectively reasonable basis to believe that the missing woman was inside the barn and, thus, could not extend the emergency exigency to include a search of the barn. *Id.* The driver's statement to police was that his girlfriend was inside the trailer, not the barn. Further, there were no attendant facts that would indicate that the woman was inside the barn. Trooper Rogers's observation of two dogs exiting the barn simply does not give rise to a reasonable belief that the woman would be located in the barn. It is perfectly normal for dogs to investigate when strangers are in their yard. Thus, we conclude that the trial court erred by admitting the evidence on this basis.

Additionally, we note that the evidence would not be admissible under the "open fields" doctrine, which provides that the Fourth Amendment's protection against unreasonable searches and seizures do not extend to open fields. *U.S. v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987). The Fourth Amendment only protects a house and its curtilage, which constitutes the area where the intimate activities associated with the sanctity of an individual's home and the privacies of life take place. *Id.* However, when the open fields

doctrine was invoked in the context of the search of a barn in *Dunn*, the U.S.

Supreme Court observed the following:

[t]he officers never entered the barn, nor did they enter any other structure on respondent's premises. Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the [illegal activity] located in respondent's barn.

*Id.* at 304.

Even assuming that the barn was outside of the curtilage of Hawkins's residence, Trooper Rogers did not stop and observe the interior of the barn from the vantage point of the open field. Trooper Rogers did not merely peer into the barn's open front and observe evidence of a crime as in the case of *Dunn*. Quite the opposite, Trooper Rogers specifically testified that he did not see evidence of the methamphetamine lab until after he entered the barn. Under these facts, we believe that his search violated the permissive scope of the open fields doctrine.

If a defendant's constitutional rights are violated, the exclusionary rule provides that evidence obtained from the illegal search is inadmissible against a defendant. *Wilson v. Commonwealth*, 37 S.W.3d 745, 748 (Ky. 2001).

Moreover, the exclusionary rule extends to the direct as well as to the indirect products of the illegal conduct by police. *Id.* Therefore, if evidence is derivative of the original constitutional violation, it must also be suppressed. *Id.*

Therefore, we conclude that the admission of the evidence resulting from Trooper Rogers's entry into the barn and the evidence obtained following the execution of the warrant based on Trooper Rogers's impermissible entry into the barn must be suppressed as a violation of Hawkins's Fourth Amendment rights.

Although we are remanding this case for a new trial, we will address Hawkins's second contention to provide guidance during a potential retrial.

Hawkins contends that the trial court erred by permitting the prosecutor to argue to the jury that Hawkins was required to prove his innocence. He contends that this violated his constitutional right to have the Commonwealth prove his guilt beyond a reasonable doubt.

During trial, Hawkins and his girlfriend testified that Hawkins had purchased a truck which contained a black bag in the bed of the truck. The bag contained items that Hawkins believed could be used for illegal purposes. He testified that he desired to dispose of the bag but was afraid that the seller of the truck would want the bag returned. He testified that the seller was an intimidating person and he was afraid of him. He testified that he gave the bag to his girlfriend to store and she placed the bag inside his trailer. There was testimony that other items were removed from the truck and stored in the barn. Therefore, Hawkins's theory was that the contraband was inadvertently obtained from the truck purchase.

During the cross-examination of Hawkins and his girlfriend, the prosecutor asked the witnesses why they had never informed police about the truck seller and Hawkins's inadvertent possession of the contraband before the trial. The



prosecutor further told the jury that Hawkins and his witnesses had months to conjure up an explanation to account for his possession of the contraband. While Hawkins argues that these questions and statements impermissibly transferred the burden of proof to him, the issue is better framed as a claim against the prosecution's violation of Hawkins's right of post-arrest silence.

It is well-established that a defendant has a Fifth Amendment right against compelled self-incriminating testimony. *McCloud v. Commonwealth*, 286 S.W.3d 780, 786-87 (Ky. 2009). "The Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been informed of his rights and taken into custody." *Hunt v. Commonwealth*, 304 S.W.3d 15, 35 (Ky. 2009). However, these protections are not applicable to mere witnesses who themselves are not facing criminal jeopardy. *Gerlaugh v. Commonwealth*, 156 S.W.3d 747, 757 (Ky. 2005).

Applying these principles, we conclude that the prosecutor's comments and questions to Hawkins were improper. The failure to cooperate with police before a trial cannot be used to ridicule a defendant's testimony. To permit such commentary, we would be constitutionally mandating defendants to fully cooperate with police or risk their non-cooperation being an issue at trial. Despite the Commonwealth's argument, the Fifth Amendment to the United States Constitution requires more of the prosecution. Accordingly, the prosecution is prohibited from asking or commenting about Hawkins's post-arrest silence.

However, with respect to Hawkins's witnesses, they cannot invoke the Fifth Amendment unless their testimony would potentially be incriminating to themselves. Therefore, the prosecutor was properly permitted to ask them why they waited until trial to state that the contraband came from the former owner of the truck that Hawkins purchased. *Gerlaugh*, 156 S.W.3d at 757.

For the foregoing reasons, the judgment of conviction of the Anderson Circuit Court is reversed and this case is remanded for a new trial.

SHAKE, SENIOR JUDGE, CONCURS.

KELLER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KELLER, JUDGE, DISSENTING: I respectfully dissent from the majority for two reasons. First, I do not believe that Trooper Rogers's entry of the barn went beyond what is permissible under the exigent circumstances exception to Hawkins's right to be free from unwarranted search. As noted by the majority, a search based on exigent circumstances must be strictly circumscribed. *Mincey*, 437 U.S. at 385, 98 S.Ct. at 2413. However, under these circumstances, I do not believe that Trooper Rogers's entry of the barn went beyond that circumscription. Trooper Rogers had information that a woman may be in need of aid and that she was likely in a trailer on Hawkins's property. When no one responded to knocks on the front and back doors of the trailer, it was not unreasonable for Trooper Rogers to look further for the woman. The deputy who was present thought he heard voices emanating from a camper on the premises. Additionally, Trooper

Rogers saw two large dogs exit from a barn located on the property. Taking all this into account, it was not only reasonable, but prudent law enforcement investigation to look for the missing woman in the open barn.

Second, I agree with the majority that the Commonwealth's questioning of Hawkins regarding his failure to disclose that the evidence of meth production came to him by happenstance, may have crossed a line. However, that issue was not preserved and, in light of all of the other evidence, I do not believe that this questioning by the Commonwealth rose to the level of palpable error.

For the foregoing reasons, I would affirm the trial court.

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