RENDERED: December 29, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001756-MR
AND 1999-CA-001757-MR

THOMAS EDWARD JONES — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 98-CR-00173 & 98-CR-00174

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: These are consolidated appeals from a conditional guilty plea in the Ohio Circuit Court to two counts of possession of methamphetamine, and one count each of manufacturing methamphetamine, trafficking in methamphetamine, and possession of drug paraphernalia. The appellant argues that the trial court erred in denying his motions to suppress statements which he made and evidence which was seized following two separate arrests. He also contends that the trial court erred in denying his motions for separate trials on the two indictments. Finding no error, we affirm.

On December 1, 1998, the Ohio County Grand Jury returned Indictment No. 98-CR-00174, charging that on November 6, 1998, the appellant, Thomas Edward Jones, committed the offenses of first degree manufacture of methamphetamine, KRS 218A.1432, and second degree possession of a controlled substance, KRS 218A.1415. On the same day, the Ohio County Grand Jury returned Indictment No. 98-CR-00173, charging that on November 17, 1998, Jones committed the offenses of first degree manufacturing of methamphetamine, KRS 218A.1432; possession of a controlled substance (methamphetamine), KRS 218A.1415; trafficking in methamphetamine, KRS 218A.1435; and possession of drug paraphernalia, KRS 218A.500(2). The charges in the separate indictments were consolidated for trial.

Prior to trial, Jones filed several procedural and evidentiary motions. In Indictment No. 98-CR-00174, Jones filed motions to suppress evidence which was seized and statements which he had made to the police following his arrest on November 6TH. Jones also moved to merge the charge of possession of a controlled substance into the charge of manufacturing methamphetamine. In Indictment No. 98-CR-00173, Jones moved to suppress evidence which was seized from his vehicle following the November 17TH arrest. In addition, Jones filed a motion for separate trials on the two indictments. Following a hearing, the trial court denied all of Jones's motions.

Thereafter, Jones entered a conditional guilty plea pursuant to RCr 8.09 to one count of manufacturing methamphetamine in the first degree, two counts of possession of

methamphetamine, and one count each of trafficking in methamphetamine and possession of drug paraphernalia. The trial court accepted the guilty plea and sentenced Jones in accord with the Commonwealth's recommendation.[1] This appeal followed.

Although these are separate appeals, they have been consolidated before this Court as they were before the trial court. Since the suppression issues arise out of different searches and involve distinct issues, we shall address each separately. In addition, Jones's motion for separate trials are common to both appeals. Consequently, we shall address that issue following our consideration of the suppression questions.

Indictment No. 98-CR-00174

Charles Radcliff, an officer with the Kentucky Department of Fish and Wildlife, testified that on October 28, 1998, he received information from an unnamed Owensboro police officer. This officer advised Radcliff that he had spotted an individual passed out in a vehicle in the Peabody Wildlife Management Area.[2] A check of the vehicle's licence plate showed it to be registered to Jones. Later that day, Officer Radcliff

[1] In Indictment No. 98-CR-00173, the trial court sentenced Jones to ten years on the manufacturing charge, four years for possession of methamphetamine, five years on trafficking methamphetamine and twelve months for possession of drug paraphernalia, all to run concurrently for a total of ten years' imprisonment. In Indictment No. 98-CR-00174, the trial court sentenced Jones to two years on possession of methamphetamine and two years on second degree possession of a controlled substance, to run concurrently with each other for a total of two years, but consecutively with the ten-year sentence in Indictment No. 98-CR-00173 for a total of twelve years' imprisonment.

[2] The Peabody Wildlife Management Area is owned by Peabody Coal Company and is managed by the Department of Fish and Wildlife Resources.

went to the area where the vehicle had been parked. The individual was gone, but Officer Radcliff stated that he saw debris such as coffee filters, liquid fire, pseudoephedrine, empty packages and cans of ether with holes punched in the sides. Officer Radcliff testified that these items are consistent with components used in the manufacture of the methamphetamine drug crank.

Officer Radcliff further testified that he went back to the area twice, on October 31ST and November 2ND. On both these occasions, he found similar debris, but no sign of Jones or his vehicle. However, when he returned to the area around 8:30 a.m. on November 6, Officer Radcliff saw Jones. Officer Radcliff testified that he observed Jones for approximately ten to fifteen minutes. He saw Jones picking up a jar from the ground and pouring its contents into glasses with coffee filters. Officer Radcliff stated that as he approached Jones, he detected a strong odor of ether and anhydrous ammonia. Based upon this information, Officer Radcliff approached Jones with his weapon drawn, placed him under arrest and handcuffed him.

Officer Radcliff further testified that after the arrest, he informed Jones of his rights under Miranda v. Arizona,[3] and then radioed the Kentucky State Police and the Ohio County Sheriff's Department for assistance. At one point, Officer Radcliff told Jones to "shut up", when Jones wanted to talk. However later, he asked Jones, "what are you making?"

[3] 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Jones replied, "what do you think?". Officer Radcliff asked again, "are you making crank?" Jones responded, "you tell me."

When Kentucky State Police Trooper Jerry Critcheloe arrived approximately ten minutes later, Officer Radcliff turned Jones over to him. He told Trooper Critcheloe that he read Jones the Miranda warning, but he asked Trooper Critcheloe to do it again. Deputy Norman Payton and Sheriff Dulin of the sheriff's department arrived shortly thereafter. Officer Radcliff and Deputy Payton both testified that they heard Trooper Critcheloe read the Miranda rights to Jones. In addition, Deputy Payton testified that he restated the warning to Jones, and Jones answered that he understood. Jones disputes the testimony that the various officers read him his Miranda rights prior to the time he made the incriminating statements.

Thereafter, Jones was questioned at the scene by Deputy Payton. Payton, who had been acquainted with Jones for a number of years, testified that Jones appeared "a little bit shook up", but was otherwise calm. Deputy Payton recalled telling Jones, "you don't have to talk to us but it would probably help if you cooperated with us on this." Deputy Payton explained that he also told Jones that he could not make any promises but he believed that Jones would be in a better position if he cooperated. After further questioning, Jones admitted to Deputy Payton that he had been "cooking" methamphetamine, and Jones provided the names of two persons for whom he had been manufacturing the crank. On cross-examination, Deputy Payton admitted that he asked Jones if his mother was still in bad

health. Payton commented that this arrest would be hard on Jones's mother, and that Jones should be at home with her rather than involved in this activity.

In his motion to suppress, Jones raised three grounds for excluding the statements and evidence obtained following this arrest. First, Jones argued that Officer Radcliff, as an officer of the Department of Fish and Wildlife Resources, was not statutorily authorized to make the arrest. As a result, Jones contends that the arrest was invalid, and any statements which he made or evidence seized as a result of the arrest must be excluded. We disagree.

KRS 150.090(1) provides:

> Conservation officers appointed by the commissioner shall have full powers as peace officers for the enforcement of all of the laws of the Commonwealth, except that they shall not enforce laws other than this chapter and the administrative regulations issued thereunder or to serve process unless so directed by the commissioner in life threatening situations or when assistance is requested by another law enforcement agency.

At the suppression hearing Officer Radcliff testified that he based his authority to arrest Jones on a directive issued by the Commissioner of the Department of Fish and Wildlife Resources issued at the request of the Kentucky State Police. Although the directive was not introduced before the trial court, it appears that this directive was the same as the one discussed in Mercer v. Commonwealth.[4] Consequently, we agree with the

[4] Ky. App., 880 S.W.2d 899, 900 (1994). In an appendix to its brief, the Commonwealth submits a copy of the July 18, 1990 letter from then Acting KSP Commissioner Michael Troop requesting (continued...)

trial court that Officer Radcliff had the authority to arrest Jones for manufacturing methamphetamine.

Even if Officer Radcliff was not specifically authorized to arrest Jones, we conclude that Jones's constitutional rights were not prejudiced. It is undisputed that Jones was on the property of the Peabody Wildlife Management Area at the time he was arrested. Officer Radcliff was performing his official duties on property managed by the Department of Fish and Wildlife Resources when he encountered Jones. After Officer Radcliff arrested Jones, he immediately called for police backup and turned Jones over to them as soon as they arrived. Jones did not make any incriminating statements to Officer Radcliff before the police arrived, and all of the physical evidence was in open view. We find that Officer Radcliff, upon observing Jones engage in apparent criminal conduct, was authorized to detain Jones until the police arrived.

Jones next contends that Officer Radcliff did not have probable cause to arrest him. We disagree. 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

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[4](...continued)
the assistance of all duly appointed conservation officers in the enforcement of criminal laws. The Commonwealth also submits a copy of the November 23, 1992 general order from the Commissioner of the Department of Fish and Wildlife Resources, setting out guidelines for conservation officers to exercise general law enforcement duties under certain circumstances. These documents were not introduced before the trial court, and consequently they are not properly before this Court on appeal. Nevertheless, we find that the trial court was entitled to take notice of these directives based upon this Court's holding in Mercer v. Commonwealth.

individual committed the felony.[5] In other words, was there, at the time of the arrest, probable cause to make the arrest?[6] Probable cause cannot be found in retrospect.[7] Probable cause exists when the totality of the evidence, then known to the arresting officer, creates a fair probability that the arrested person committed the felony.[8]

As discussed above, Officer Radcliff testified that he observed Jones from a distance of about sixty feet for approximately ten to fifteen minutes. Upon approaching nearer, Officer Radcliff stated that he smelled anhydrous ammonia and ether. Based upon his training and experience, Officer Radcliff concluded that Jones's activity was consistent with the manufacture of methamphetamine. Viewing the circumstances as a whole, we find that the trial court properly found probable cause for the arrest.

The third ground of error raised by Jones is that the trial court erred in finding that the statements which he made to the police following his arrest were admissible. Jones contends that he was not advised of his Miranda rights. He further argues that the custodial interrogation was coercive, and he was unable to make a knowing and voluntary waiver of his rights prior to

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[5] Crawford v. Commonwealth, Ky., 824 S.W.2d 847, 849 (1992).

[6] Clark v. Commonwealth, Ky. App., 868 S.W.2d 101, 106 (1993).

[7] Id.

[8] *See* Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 913-15 (1984); Clark. at 106-07. *See also* Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 705 (1994).

making statements to the police. In ascertaining whether a custodial confession should be admitted, a trial court must find the confession to be voluntary. In doing so, the trial court must consider whether the defendant: (1) was lawfully arrested; (2) was given his Miranda warnings; and (3) effectively waived his right to counsel.[9] The fact that one suspected of a crime has no attorney present does not prevent him from confessing his crime if he does so voluntarily knowing that his confession may be used against him.[10] If the trial court's factual findings on a motion to suppress are supported by substantial evidence, they must be considered as conclusive.[11]

Based upon the accumulation of the evidence and the court's own determination of the credibility of the witnesses, the trial court found that Jones had been advised on his rights prior to making the incriminating statements. From these findings, the trial court found that Jones made a knowing and voluntary waiver of his rights, and therefore his confession was admissible. However, the trial court further stated that it might reconsider this ruling if additional evidence was presented at trial. After reviewing the record, we find that these findings were supported by substantial evidence. Thus, the findings are conclusive of the issue.

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[9] Crawford v. Commonwealth, 824 S.W.2d at 849 (citing Rigsby v. Commonwealth, Ky., 284 S.W.2d 686 (1956); Harper v. Commonwealth, Ky., 694 S.W.2d 665 (1985); Colorado v. Spring, 479 U.S. 564, 93 L. Ed. 2d 954, 107 S. Ct. 851, (1987)).

[10] Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 677 (1985).

[11] RCr 9.78; Talbott v. Commonwealth, Ky., 968 S.W.2d 76, 82 (1998).

Indictment No. 98-CR-00173

This indictment arose out of Jones's arrest which occurred ten days after the earlier arrest. On November 17th, the Ohio County Sheriff's Department executed a search warrant for the residence, grounds and vehicles located on premises in Beaver Dam, Kentucky owned by Steven Herald. When the officers arrived to execute the warrant, they found Jones present, sitting beside a baby bed in which crank was later found. Deputy Alan Lacy took Jones outside and asked him to produce some identification. Jones then walked to his vehicle where his wallet was located, and Deputy Lacy followed. When Jones opened his wallet a small baggie of brown powder fell out. The later test results of this substance established that it was not a controlled substance. Deputy Greg Clark arrived after Deputy Lacy found the baggie. Deputy Clark testified that while he was standing next to Jones's vehicle, he smelled ether and anhydrous ammonia. When Deputy Clark looked inside the car, he saw a jar containing a substance covered with a rag and secured by tape. He also saw loose coffee filters and batteries lying on the front seat. Upon further search of the vehicle, additional evidence of manufacturing of methamphetamine was found in the trunk of the car.

Jones first argues that the police officers had no basis to ask him for his identification or to follow him to his vehicle and look inside. We disagree. The Sheriff's Department had arrived at the property which Jones was visiting to execute a search warrant. Apparently, the officers conducted a brief pat-

down search of Jones in the house shortly after they arrived. In order to properly secure the area for the search, the police officers asked Jones to step outside. Since he had been found near an area of suspected criminal activity, Deputy Lacy asked Jones for identification, and he followed Jones to the car when Jones went to retrieve his wallet.

An individual's presence in an area of suspected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.[12] Furthermore, the police had already conducted a preliminary "pat down" search of Jones to ensure their own safety.[13] Thus, it is doubtful that the police had probable cause to justify a further search of Jones at that point.

However, the Fourth Amendment protection against unreasonable search and seizure is not implicated when a police officer merely approaches an individual and asks the person to answer some questions,[14] or requests identification.[15] Under the circumstances of this case, we find that Deputy Lacy had a reasonable basis to ask Jones to produce identification.

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[12] Brown v. Texas, 443 U.S. 47, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979).

[13] *See* Terry v. Ohio, 392 U.S. 1, 80 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

[14] Florida v. Royer, 460 U.S. 491, 498, 75 L.Ed.2d 229, 236, 103 S.Ct. 1319 (1983).

[15] Immigration and Naturalization Service v. Delgado, 466 U.S. 210, 216, 80 L. Ed.2d 247, 255, 104 S. Ct. 1758 (1984).

Furthermore, the search warrant permitted a search of the grounds of the residence. Deputy Lacy was entitled to follow Jones to his car in order to ensure that the premises remained secure.

With respect to the search and subsequent seizure of evidence found inside the vehicle, we likewise find that this evidence was admissible. In order for a warrantless search to be upheld, it must fall within one of four exceptions to the warrant requirement: (1) a consent search; (2) a plain view search; (3) a search incident to a lawful arrest; or, (4) a probable cause search.[16] The items which Deputy Clark saw on the front seat of Jones's car (the jar with a rag over it, coffee filters and batteries) were in plain view from the outside of the vehicle.[17] Furthermore, Deputy Clark testified that he smelled antihydrants and ether coming from inside the vehicle. When an officer is where he has a right to be, he may seize contraband which comes into plain view or smell, as the case may be.[18]

In addition, we agree with the trial court that the subsequent search of the rest of the vehicle was authorized. A warrantless search of a vehicle is allowed when the officers have probable cause to believe an automobile contains contraband or

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

[17] *See* Coolidge v. New Hampshire, 403 U.S. 443, 465, 29 L.Ed.2d 564, 582, 91 S.Ct. 2022 (1971).

[18] Gillum v. Commonwealth, Ky. App., 925 S.W.2d 189, 191 (1995).

evidence of a crime.[19] The test for probable cause is whether, after considering the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[20] In light of all of the circumstances then existing, we agree with the trial court that the police had probable cause to search Jones's vehicle.

Jones also requests that this Court "certify the law as to whether trafficking and possession of methamphetamine are lesser included offenses to manufacturing methamphetamine." The guidelines for certification of questions of law are set out in CR 76.37. This Court is not the proper forum in which to seek a certification on a question of law, nor is the Ohio Circuit Court an authorized forum from which to seek a certification of law. Accordingly, this Court does not have jurisdiction to address this matter. Furthermore, the trial court ruled that the question of merger of offenses in the indictment was reserved until presentation of proof at trial. Given Jones's conditional guilty plea (which did not preserve this issue for review), we find that this matter is not properly presented on appeal.

Denial of Motion for Separate Trials

In both appeals, Jones contends that the trial court erred in denying his motions for separate trials on the two indictments. He contends that a combined trial would expose the jury to evidence of both offenses which would make the jury more

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[19] Brown v. Commonwealth, Ky., 890 S.W.2d 286, 290 (1994).

[20] Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 914 (1984) (quoting Illinois v. Gates, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548, 103 S. Ct. 2317 (1983)).

inclined to convict based on a belief in his criminal disposition or bad character. The trial court rejected this line of reasoning, noting that the counts are sufficiently similar in nature to establish a common scheme or purpose which would allow charges to be tried together. The court also cited to the need for judicial economy.

RCr 9.12 permits consolidation of two or more indictments for trial, if the offenses could have been joined in a single indictment. A trial court is vested with wide discretion in applying this rule.[21] That discretion will not be overturned absent a showing of prejudice and clear abuse of discretion.[22] A significant factor in identifying such prejudice is the extent to which evidence of one offense would be admissible in a trial of the other offense.[23] Where the offenses charged in the indictments are sufficiently similar as to indicate a common scheme or plan which would be admissible in the event of separate trials, joinder of the offenses in a single trial could be appropriate.[24]

In the present case, the evidence of each offense was simple and distinct. On both occasions, Jones was found in possession of methamphetamine, and with materials used in the manufacture of methamphetamine. The charges were closely

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[21] Brown v. Commonwealth, Ky., 458 S.W.2d 444, 447 (1970).

[22] Cannon v. Commonwealth, Ky., 777 S.W.2d 591 (1989).

[23] Rearick v. Commonwealth, Ky., 858 S.W.2d 185, 187 (1993).

[24] Id.; *citing* Anastasi v. Commonwealth, Ky., 754 S.W.2d 860 (1988).

connected in time by a ten-day period. We agree with the trial court that the facts underlying both indictments are sufficiently similar as to justify a consolidated trial.

Accordingly, the judgment of the Ohio Circuit Court is affirmed.

ALL CONCUR.

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