RENDERED: NOVEMBER 5, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001298-MR
AND
NO. 2003-CA-001299-MR

STEVE EDWARDS AND
RICHARD ALLEN EDWARDS — APPELLANTS

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NOS. 02-CR-00005-1 & 02-CR-00005-2

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

KNOPF, JUDGE: Brothers Steve and Richard Edwards appeal from separate judgments of the Green Circuit Court, entered August 10, 2003, convicting them, following their joint trial, of cultivating five or more marijuana plants,[1] of trafficking in

[1] KRS 218A.1423(2).

marijuana,[2] and of possessing drug paraphernalia.[3] Steve was sentenced to two years in prison, Richard to one year. They contend that the trial court erred by refusing to suppress evidence seized from their Green County farm, by refusing them a continuance when a co-defendant changed his plea and agreed to testify for the Commonwealth, and by denying their motions to dismiss the charge of cultivating five or more plants. We affirm.

In late August or early September 2001, a Green County deputy received a tip that marijuana was being grown in one of the barns on the Edwardses' farm. The deputy notified a narcotics detective for the Kentucky State Police, and together, during the night of September 12, 2001, they entered the Edwardses' land to investigate. Without entering the barn, the officers observed through windows that it had been partitioned into several rooms with an office area separated by padlocked doors from storage areas and from areas that had formerly been used for working with livestock. Through a vent fan and through a crack in a door into one of the livestock areas they saw a tray like a sheet-cake pan in which seedlings appeared to be growing under a florescent lamp.

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[2] KRS 218A.1421.

[3] KRS 218A.500.

From mid-September until December 5, the officers looked into the barn eight or nine more times. When the plants in the pan became larger, the detective identified them as marijuana. The officers also observed a steady light shining from a room into which they could not see and heard what the detective recognized as the ballast for a grow light coming from that room. On one occasion they saw the processed remains of three large marijuana plants. They saw what they believed were marijuana trimmings and residue on the floor in several of the areas. And they saw small plastic bags like those often used to package marijuana for sale.

On December 5, 2001, the detective obtained and executed a search warrant for the barn. The search uncovered three large potted marijuana plants, about three pounds of processed marijuana in several small bags, a grow light, electronic scales, Steve Edwards's journal describing an attempt to start plants from clippings from a parent plant, and a small quantity of cocaine. The brothers were indicted and tried with the result noted above.

The brothers contend that they should not have been convicted of cultivating five or more plants when the search yielded only three plants and when the detective testified that he could not tell how many plants he had seen in the tray. As they concede, however, this Court must uphold the jury's verdict

unless it so lacked evidentiary support that no reasonable juror could have reached it.[4]

The deputy testified that he had seen at least five plants in the tray; the detective testified that he had seen the three processed plants, which together with the seized plants makes six; and Steve's journal, which a juror could reasonably believe referred to marijuana, said that there had been more than five starts from the parent plant. This is ample evidence to support the jury's verdict. The trial court did not err, therefore, by denying the brothers' motions to reduce the cultivation charge.

A friend and business associate of the Edwardses was indicted along with them, and on the morning trial was to begin they learned that this co-defendant had just pled guilty and would testify for the Commonwealth. Claiming to have been unfairly surprised by this development, the Edwardses moved for a continuance. The trial court abused its discretion, they contend, when it denied that motion.

As our Supreme Court has stated many times, in ruling on a motion for a continuance the trial court should consider

> (1) length of delay sought; (2) previous continuances; (3) inconvenience to litigants, witnesses, counsel, and the court; (4) whether the delay is purposeful or is caused by the accused; (5)

[4] Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

> availability of other competent counsel, if at issue; (6) complexity of the case; and (7) whether denying the continuance would lead to identifiable prejudice.[5]

At the time of the Edwardses' motion, their trial, which would not be complex, had already been pending for fifteen months and had been continued twice, once because the Edwardses had attempted to appeal from a clearly interlocutory evidentiary ruling. A postponement would have caused a delay of several more months until the next open court dates and would have seriously inconvenienced the Commonwealth, some of whose witnesses had been given plane reservations that could no longer be cancelled. On the other hand, as the court noted, the risk of unfair prejudice was not great because the Edwardses should have anticipated that the co-defendant would testify. We do not believe that the trial court abused its discretion in these circumstances by denying the Edwardses' motion for a continuance.

Finally, the Edwardses contend that the trial court erred by denying their motion to suppress the evidence seized from their barn. The detective and the deputy engaged in unlawful warrantless searches, they maintain, the several times they entered the brothers' property and peered though the fan or the crack in the barn door. The search warrant was tainted by

[5] Furnish v. Commonwealth, Ky., 95 S.W.3d 34, 42 (2002).

those unlawful observations, and so its fruits should have been suppressed. We disagree.

Although the brothers insist that the barn was their business office, they do not dispute that it is an out-building in open agricultural land well removed from any residence. The United States Supreme Court has held that police officers to not violate the Fourth Amendment's guarantee against unreasonable governmental searches and seizures by trespassing upon such open fields and looking inside such out-buildings.[6] The fact that the building serves in part as an agricultural business office makes no difference,[7] nor does the fact that the officer gains his view through a small, unintentional opening.[8] The trial court did not err by denying the Edwardses' suppression motion.

In sum, the Edwardses were not entitled to a continuance the day trial began, the court properly admitted the evidence seized from their barn, and the court properly refused to reduce the cultivation charge. Accordingly, we affirm the August 10, 2003, judgment of the Green Circuit Court.

MINTON, JUDGE, CONCURS.

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[6] United States v. Dunn, 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987); Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984).

[7] United States v. Dunn, *supra.*

[8] United States v. Elkins, 300 F.3d 638 (2002); United States v. Pace, 955 F.2d 270 (1992).

DYCHE, JUDGE, DISSENTS.

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