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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001896-MR

GERALD E. DELONG — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHILLIP R. PATTON, JUDGE
ACTION NO. 02-CR-00210

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING IN PART, VACATING IN PART
AND REMANDING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Gerald E. Delong has appealed from the judgment of conviction and sentence entered by the Barren Circuit Court on August 8, 2003, following his conditional plea of guilty to the charge of possession of drug paraphernalia, first offense.[1] Having concluded that the extensive search of Delong's motel

[1] Kentucky Revised Statutes (KRS) 218A.500.

room and automobile could not be supported by the police's subsequent learning of Delong's probationary status following his arrest, or by exigent circumstances, we reverse in part. Having further concluded that the initial sweep of the motel room was a constitutional warrantless safety search under exigent circumstances, we vacate in part and remand this matter for additional findings as to which items were in plain view during the sweep.

The testimony at the suppression hearing revealed that on April 29, 2002, Detective Terry Harris of the Barren County Sheriff's Department responded to a report from the Four Seasons Inn that there was a strong chemical odor emanating from one of the rooms on the third floor.[2] Det. Harris proceeded to the third floor, accompanied by the front desk clerk and the housekeeper. Det. Harris testified that once he reached the landing on the third floor he smelled an odor, which he described as an "ammonia smell"--typical of the process of manufacturing methamphetamine.[3] For their protection, Det. Harris instructed the front desk clerk and the housekeeper to go

[2] There was no evidence as to the time Det. Harris received this call. The registration card from the Four Seasons Inn indicates that the only rented room on the third floor, room 301, was registered to Jerry Delong.

[3] During the suppression hearing, Det. Harris testified that he was unsure if the smell was that of anhydrous ammonia.

back downstairs and to evacuate the other guests staying on the third floor.[4]

At approximately 9:02 a.m., Det. Harris knocked on the door of room 301 and identified himself as a law enforcement officer. He then advised the individual to open the door; however, a male answered and refused to open the door, stating that he was sleeping. Det. Harris again knocked and instructed the individual to open the door; this time the individual responded that he needed to dress. Det. Harris continued to insist that the individual open the door, but the occupant continued to stall stating that he was unsure that Det. Harris was actually a police officer.[5] Det. Harris testified that while he was standing outside the door of room 301, he heard the individual moving about the room in a "frantic" manner, and that he heard the toilet flush five times. Det. Harris told the individual that if he did not open the door, he would be placed under arrest for disorderly conduct and for resisting arrest. Since the occupant continued to refuse Det. Harris entry, Det. Harris informed him that he was under arrest for disorderly conduct.

[4] The clerk informed Det. Harris that room 301 was the only room occupied on the third floor.

[5] Det. Harris was dressed in plain clothes; however, when the individual stated his doubt as to whether Det. Harris was a police officer, Det. Harris held his badge up to the peephole in the door for the individual to see.

At approximately 9:17 a.m., Barren County Sheriff's Deputy Chris Eaton arrived at the Inn to aid Det. Harris. When Deputy Eaton appeared at the door of room 301, dressed in his uniform, the occupant opened the door and allowed the officers to enter. The individual inside the room was identified as Gerald E. Delong, and Det. Harris placed him under arrest for disorderly conduct[6] and resisting arrest,[7] handcuffed him, and recited his Miranda[8] warnings.[9] Det. Harris then performed a protective sweep of the room to determine if there was anyone else inside the room and to insure the officers' safety.[10] After Delong was placed under arrest, he informed the officers that he was currently on probation in Warren County.[11]

Det. Harris left the Inn at approximately 10:40 a.m., and promptly contacted Officer Julie Atkins, a probation and parole officer in Barren County. At the request of Det. Harris, Officer Atkins contacted the Warren County probation office and

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[6] KRS 525.060.

[7] KRS 520.090.

[8] Miranda v. Arizona, 396 U.S. 868, 90 S.Ct. 140, 24 L.Ed.2d 122 (1969).

[9] Det. Harris testified at the suppression hearing that he advised Delong of his Miranda warnings. However, Delong claimed in his motion to suppress, filed on July 23, 2003, that "[t]he officer discovered that the Defendant was on probation by questioning him without Miranda warning following Defendant's arrest."

[10] Det. Harris described the condition of the room as "one huge mess." Amanda Cline was also present in the room and apparently she was charged with some drug-related offenses.

[11] The legality of Delong's arrest is not relevant to our review.

discovered that Delong's probation officer had been unable to locate him. Det. Harris returned to the Inn at approximately noon, and Officer Atkins arrived shortly thereafter.[12] Relying upon the fact that Delong was currently on probation, Det. Harris, Officer Atkins, Deputy Eaton, and Deputy Stephen Clark conducted an extensive search of Delong's room and vehicle.[13] During the search, the officers discovered various drug paraphernalia[14] and a variety of items used in the manufacture of methamphetamine.[15]

On May 14, 2002, a Barren County grand jury indicted Delong for manufacturing methamphetamine,[16] possession of drug paraphernalia second offense,[17] disorderly conduct, resisting arrest, and persistent felony offender in the first degree (PFO

[12] Officer Atkins stated that she did not smell a chemical odor and there was very little contraband in plain view inside the room.

[13] Officer Atkins stated that the search was performed based on the fact that Delong had "standard conditions of probation." However, she conceded that she did not request a copy of Delong's terms of probation and did not know the exact terms and conditions of his probation.

[14] The various paraphernalia discovered in the room and in the vehicle included: a broken glass tube with residue, one clear glass tube with residue, three different syringes in a plastic bag, electric scales with white residue, and a cosmetic mirror with residue.

[15] The items discovered in the search of the room and the vehicle used to facilitate the manufacture of methamphetamine included plastic tubing, four pressurized tanks, one propane tank, a large metal tub with residue and burn marks, one small clear plastic funnel, and 25 feet of standard airline tubing.

[16] KRS 218A.1432, a Class B felony.

[17] KRS 218A.500, a Class D felony.

I).[18] On July 23, 2003, Delong filed a motion to suppress "any and all evidence obtained as the result of an illegal seizure of the defendant, post-arrest statements taken from the Defendant without Miranda warnings, search of his privately rented suite and his vehicle, as well as any and all other items, information and additional statements resulting therefrom." A suppression hearing was held on July 28, 2003, at which Officer Atkins and Det. Harris testified.[19] In an order entered on August 6, 2003, the trial court denied Delong's motion to suppress the evidence seized from his hotel room and from his vehicle, relying on the fact that Delong was on probation at the time the search was conducted and had signed "a complete waiver" of his Fourth Amendment rights. The trial court specifically noted that it did "not reach the other issues presented by the Defendant and the Commonwealth. The Defendant's Fourth Amendment claims can be decided on the waiver issue alone, without a decision regarding the existence of exigent circumstances or reasonable suspicion on the part of the probation officer."

On August 8, 2003, Delong entered a conditional guilty plea[20] to the amended charge of possession of drug paraphernalia

[18] KRS 532.080(3).

[19] The record is incomplete as the entire suppression hearing was not recorded.

[20] Kentucky Rules of Criminal Procedure (RCr) 8.09.

first offense.[21] Pursuant to the plea agreement, the trial court sentenced Delong to jail to serve 12 months "concurrent[ly] with felony sentence being served for Warren County." This appeal followed.

Delong raises three arguments in his brief: (1) there was not reasonable suspicion that he had "drugs in his possession"; (2) there was not probable cause to support his arrest for disorderly conduct; and (3) his written waiver consenting to be searched did not validate the search. In its brief, the Commonwealth responds to the sole issue relied upon by the trial court, i.e., the written waiver.

Our standard of review in reviewing a trial court's decision on a motion to suppress evidence is well-established. We must "first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive.[22] Based on those findings of fact, we must

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[21] KRS 218A.050, a Class A misdemeanor. The other charges were disposed of as follows:

Count 1:	Manufacturing Methamphetamine, KRS 218A.1432 dismissed due to Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003) and date of effect of KRS 218A.1437 (Meth Precursers)
Count 2:	Possession of Drug Paraphernalia 2nd, KRS 218A.500 amended to Possession of Drug Paraphernalia, 1st offense (Prior paraphernalia charge had been merged with possession of marijuana)
Counts 3&4:	Disorderly Conduct, KRS 525.060 and Resisting Arrest KRS 520.090 dismissed per plea negotiations
Count 5:	Persistent Felony Offender I, KRS 532.080 dismissed as a matter of law.

[22] RCr 9.78.

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."[23] In Ornelas v. United States,[24] the Supreme Court of the United States "recognized that police may draw inferences of illegal activity from facts that may appear innocent to a lay person and that a reviewing court should give due weight to the assessment by the trial court of the credibility of the officer and the reasonableness of the inferences."[25]

In addressing the question of Delong's waiver, we find persuasive People v. Sanders,[26] where the police responded to a report that a fight was taking place in a nearby apartment building. Upon arrival, the officers heard a man and a woman yelling at one another inside the apartment. One of the officers on the scene knocked on the door and ordered the occupants to open the door. After a short delay, the woman opened the door and the officers arrested both occupants of the room. One of the officers then conducted a protective sweep of the apartment to make sure no one else was inside the apartment.

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[23] Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); and Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999)).

[24] 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911, 920 (1996).

[25] Commonwealth v. Whitmore, 92 S.W.3d 76, 79 (Ky. 2002).

[26] 73 P.3d 496 (Cal. 2003).

Inside one of the open bedroom closets, in plain view, the officer saw plastic bags with cocaine knotted in the corners. After completing the sweep of the apartment, the officer contacted the police department and learned that the male occupant was currently on parole and was subject to a search condition. The officer then requested additional assistance from the police department, including a police dog, and conducted an extensive search of the apartment based on the conditions of parole. The Court held that the protective sweep of the apartment was unlawful and was not justified as a parole search because the officers were unaware at the time of the search that the male occupant was on parole. The Court stated:

> [P]olice cannot justify an otherwise unlawful search of a residence because, unbeknownst to the police, a resident of the dwelling was on parole and subject to a search condition. . . . [T]his result flows from the rule that whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted and is consistent with the primary purpose of the exclusionary rule – to deter police misconduct.

In the case before us, the terms and scope of Delong's waiver of Fourth Amendment rights was not learned until after the extensive search had been completed. Thus, we must reverse the Barren Circuit Court's order denying Delong's motion to suppress to the extent of the full search of the motel room and Delong's vehicle. We will now address the question of exigent

circumstances and the extent to which the protective sweep was constitutionally proper.[27]

A well-established exception to the search warrant requirement authorizes a police officer without a warrant to enter a residence in order to address an exigent circumstance, such as the threat of imminent injury or the imminent destruction of evidence.[28] However, when exigent circumstances provide sufficient grounds for a limited warrantless safety search, that safety search must be limited to only the intervention that is reasonably necessary to address the exigency.[29] Thus, "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation[,]'"[30] and exigent circumstances do not allow an officer to disregard the warrant requirement.[31]

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[27] Since we are reviewing the facts in the light most favorable to the Commonwealth and since the trial court's ultimate determination of exigent circumstances is reviewed de novo (see United States v. Cooper, 168 F.3d 336, 339 (8th Cir. 1999)) there is no need to remand this legal issue for a determination by the trial court.

[28] Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky. 2003) (citing Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639, 653 (1980)). See also Hughes v. Commonwealth, 87 S.W.3d 850, 852 (Ky. 2002).

[29] Mincey v. Arizona, 437 U.S. 385, 393, 98 S.Ct. 2408, 2413-414, 57 L.Ed.2d 290 (1978) (citing Terry v. Ohio, 392 U.S. 1, 26, 88 S.Ct. 1868, 20 L.Ed.2d 889, 908 (1968)). See also Strange v. City of Tuscaloosa, 652 So.2d 773, 776 (Ala.Crim.App. 1994).

[30] Mincey, 437 U.S. at 393. See also Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984).

[31] Mincey, 437 U.S. at 393.

As Det. Harris testified, it is generally known that the chemicals and chemical reactions involved in manufacturing methamphetamine, including ammonia, create significant health and safety risks.[32] Thus, the trial court's finding that these risks are serious enough to justify immediate police intervention is supported by substantial evidence and not clearly erroneous.[33] While the trial court did not make a legal determination as to whether the strong smell of ammonia and Delong's evasive behavior gave the police reasonable grounds to suspect the manufacturing of methamphetamine had occurred, or was occurring on the premises, we conclude as a matter of law that there was probable cause to justify a search warrant. Further, while the trial court did not address the extent to which exigent circumstances would have supported the search in order to prevent the destruction of evidence and for the safety of the officers, we hold that under the facts most favorable to the Commonwealth the evidence supported a warrantless search only to the extent of the initial protective sweep and the

[32] United States v. Walsh, 299 F.3d 729, 734 (8th Cir. 2002) (stating that "[t]he potential hazards of methamphetamine manufacture are well documented, and numerous cases have upheld limited warrantless searches by police officers who had probable cause to believe they had uncovered an on-going methamphetamine manufacturing operation").

[33] Kleinholz v. United States, 339 F.3d 674, 677-78 (8th Cir. 2003). See also United States v. Wilson, 865 F.2d 215, 217 (9th Cir. 1989); People v. Duncan, 720 P.2d 2, 5 (Cal. 1986); and State v. Chapman, 813 P.2d 557, 560-61 (Or.App. 1991).

extensive search was not proper under exigent circumstances and required a warrant.

In summary, the evidence supported the police officers' initial entry into the motel room and their securing of the premises for safety reasons and to prevent the destruction of evidence. However, once Delong was removed from the room and the premises were secured, any additional search of the motel room without a search warrant was unconstitutional. The officers' safety search of Delong's motel room should have been limited only to removing people from the area, to observing items in plain view, and to securing any item in plain view that constituted a present danger.[34] To the extent the officers conducted a warrantless search for evidence throughout the motel room and Delong's vehicle, the searches were unconstitutional.

However, we are limited in addressing this issue because the trial court failed to make essential, specific factual findings. Thus, we must vacate this portion of the trial court's order and remand this matter for additional findings. The trial court should make specific findings as to which items, if any, were in plain view during the initial safety search, and thus, lawfully seized under exigent circumstances. However, any evidence that was not in plain view during the safety search must be suppressed; and upon the

[34] Kleinholz, 339 F.3d at 674.

suppression of any evidence, Delong shall be allowed to withdraw his guilty plea, if that is his desire.

Accordingly, the judgment of the Barren Circuit Court is reversed in part and vacated in part, and this matter is remanded for additional findings consistent with this Opinion.

ALL CONCUR.

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