

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-002173-MR

FLOYD GROVER JOHNSON

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE LARRY MILLER, JUDGE  
ACTION NO. 04-CR-00046

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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

NICKELL, JUDGE: Floyd Grover Johnson (hereinafter “Johnson”) entered a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 in the Breathitt Circuit Court to the charge of trafficking in a controlled substance in the first degree<sup>1</sup> and received a sentence of seven years’ imprisonment.<sup>2</sup> The conditional plea specifically

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<sup>1</sup> Kentucky Revised Statutes (KRS) 218A.1412.

<sup>2</sup> Pursuant to plea negotiations, a charge of persistent felony offender in the second degree was dismissed.

reserved the right to appeal from the circuit court's denial of Johnson's May 24, 2005, motion to suppress evidence or alternatively, to dismiss the indictment against him for want of jurisdiction. It is from this denial that Johnson appeals to this Court. For the following reasons, we affirm.

On January 19, 2004, Johnson sold OxyContin<sup>3</sup> tablets to a witness in the presence of an undercover officer.<sup>4</sup> Subsequently, on March 29, 2004, Officer Kenneth Spicer of the Jackson Police Department filed a criminal complaint based upon said sale. An arrest warrant was issued and Johnson was arrested on April 6, 2004, on the charge of trafficking in a controlled substance in the first degree. A Breathitt County grand jury indicted Johnson on June 2, 2004, for the trafficking offense and for being a persistent felon.

Discovery revealed that officers from several jurisdictions participated in the investigation of this and other drug-related cases under the purported authority of a multi-jurisdictional agreement executed pursuant to KRS 65.290-.300. This agreement formed an entity known as Unlawful Narcotics Investigations, Treatment and Education, Inc. (hereinafter "UNITE"). Prior to trial in this matter, the defense requested verification of UNITE's jurisdiction or, alternatively, for an evidentiary hearing to determine the authority of UNITE officers to act as law enforcement officers within

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<sup>3</sup> OxyContin is the trade name for the potent pain medication oxycodone, a Schedule II controlled substance, and is one of the leading opioid painkillers on the market.

<sup>4</sup> The record is unclear as to the identity of the undercover officer and for which law enforcement agency he or she worked.

Breathitt County.<sup>5</sup> A hearing was conducted on December 2, 2004, wherein UNITE, after receiving permission to file an amicus curiae brief, tendered numerous documents and offered background information on the formation of the entity.<sup>6</sup>

Concurrently with his request, Johnson moved to suppress the evidence against him, or alternatively, to dismiss the indictment on the basis that UNITE officers were not empowered to act in a law enforcement capacity within Breathitt County on the date the undercover controlled drug buy for which he stood charged occurred. Specifically, Johnson argued that until all of the formation documents were filed with the Secretary of State and various county clerks, UNITE was without jurisdiction in Breathitt County, pursuant to the express language of KRS 65.290.

According to the record, UNITE was formed under the provisions of the Interlocal Cooperation Act<sup>7</sup> in an effort to allow local governmental units to have concurrent jurisdiction in drug investigations. In all, agencies from 29 counties joined in the formation, and three task forces were formed to cover these geographical areas. The proper officials of Breathitt County executed the agreement to join UNITE in late 2003, and its participating law enforcement officers were subsequently assigned to the

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<sup>5</sup> A review of the record reveals that at least five defendants filed concurrent motions with the same basic allegations. For purposes of judicial economy, the circuit court consolidated these motions and entered a single order covering all of these defendants. It appears that Johnson is the only defendant who appealed, and our discussion will be so limited.

<sup>6</sup> We note that no testimony was taken by the circuit court, only the explanations and arguments of counsel for the various parties.

<sup>7</sup> KRS 65.210 to 65.300.

Kentucky River Task Force. The Attorney General approved the formation agreement on January 8, 2004. However, an addendum and a supplemental agreement were prepared and executed by the various parties between January 20, 2004, and March 16, 2004. The final documents were filed with the Secretary of State on April 5, 2004, and with the various County Court Clerk's between April 14 and April 16, 2004.

Johnson argued that pursuant to the express language of the statute, and in light of the timeline set forth, this agreement did not become effective and confer jurisdiction until April 15, 2004. The trial court, in an order entered on May 24, 2005, denied Johnson's motions, holding, inter alia that the filing requirements of KRS 65.290 to 65.300 are directory in nature and not mandatory, that the parties had substantially complied with the statutory scheme prior to beginning any investigations, that any procedural violations of the statute were harmless, that UNITE had been conferred jurisdiction to operate in Breathitt County on October 23, 2003,<sup>8</sup> that KRS 431.007(1)<sup>9</sup> could easily be substituted for the Interlocal Agreement to allow cooperation and

<sup>8</sup> This is the date that the Breathitt County Fiscal Court entered into the Interlocal Agreement with UNITE.

<sup>9</sup> KRS 431.007(1) provides:

A policeman directly employed as a full-time police officer by a Kentucky city, county, or urban-county government and whose department meets the requirements of KRS 15.440 and a sheriff or full-time deputy sheriff who is officially requested by a law enforcement agency in another county in Kentucky to assist in any matter within the jurisdiction of the requesting agency shall possess, while responding to and for the duration of the matter for which the request was made, the same powers of arrest in the requesting county as he possesses in the county in which he is a police officer.

assistance between agencies, and that KRS 95.019(1),<sup>10</sup> which confers county-wide arrest powers upon city police officers,<sup>11</sup> was sufficient to support Johnson's investigation and subsequent arrest. Following entry of this order, on August 30, 2005, Johnson entered his conditional guilty plea, expressly reserving, in writing, his right to appeal the Circuit Court's order denying him relief, and was thereafter sentenced to serve ten years in prison. This appeal follows.

On appeal, Johnson's sole contention is that the circuit court erred in ruling that UNITE had jurisdiction to act in a law enforcement capacity on January 19, 2004, despite having failed to comply with the statutory framework set forth in KRS 65.210 to 65.300, thus mandating reversal with instructions to suppress all of the evidence obtained against him. While we agree the agreement was not fully consummated prior to the investigation of Johnson's criminal activities, we find no reversible error. The true question presented is whether the officers involved in this investigation, arrest, and prosecution were properly empowered to so act. We find they were.

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<sup>10</sup> KRS 95.019(1) provides:

The chief of police and all members of the police force in cities of the first through fifth classes shall possess all of the common law and statutory powers of constables and sheriffs. They may exercise those powers, including the power of arrest for offenses against the state, anywhere in the county in which the city is located, but shall not be required to police any territory outside of the city limits.

<sup>11</sup> It is noted that Jackson, Breathitt County, Kentucky, is a city of the fourth class. KRS 81.010(4).

The uncontroverted evidence presented to the trial court reveals the criminal complaint, which was presented to the magistrate, was filed by Officer Spicer, a Jackson city police officer, and the ensuing warrant was served by Officer Barrett, another officer from the Jackson Police Department. An undercover officer from an unknown agency<sup>12</sup> was present when the OxyContin sale was consummated. There is no indication in the record that this officer had anything more to do with the investigation. It is further uncontroverted that the offense, arrest, and conviction all occurred within the corporate limits of Breathitt County. As stated previously, KRS 95.019(1) empowers the Jackson Police Department to make lawful arrests within the boundaries of Breathitt County. Although the officers involved referred to themselves as UNITE officers, they were actually employed by the City of Jackson and had been assigned by the chief of police to work on the recently formed task force. This assignment did not strip them of their statutorily granted arrest powers. Johnson is unable to point to any authority to the contrary. Having so found, any further inquiry into whether UNITE had jurisdiction on January 19, 2004, is rendered moot.

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<sup>12</sup> The fact that the identity of this officer, and that of his or her employer, were not presented to the trial court is of no consequence for this appeal. Law enforcement officers routinely utilize members of agencies outside the immediate area in drug and other criminal investigations in an effort to avoid recognition by the subjects of the investigation. Furthermore, the use of confidential informants and the like are often used without issue. For these reasons, whether the undercover officer was operating under the auspices of UNITE or not is immaterial to our discussion. His role was merely to observe and report his findings, an area not specifically reserved to sworn police officers.

For the foregoing reasons, we find that the Breathitt Circuit Court correctly denied Johnson's alternative motion for suppression or for dismissal. Therefore, the judgment is affirmed.

ALL CONCUR.

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