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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000287-MR

JOHNATHAN D. PARKS — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 07-CR-00086

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Johnathan D. Parks appeals from a judgment of the Muhlenberg Circuit Court sentencing him to ten years' imprisonment in accordance with a conditional guilty plea to one count of manufacturing methamphetamine. Parks contends that the trial court erred by failing to grant his

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

motion for a continuance and by denying his motion to suppress evidence seized in a warrantless search. After our review, we find no reversible error and affirm.

FACTS AND PROCEDURAL HISTORY

The following facts were set forth in testimony given at a suppression hearing. On the night of May 14, 2007, Curtis McGehee and Mike Chambers, special deputies of the Muhlenberg County Sheriff's Department, were assigned to observe anhydrous ammonia tanks at Bickett Farms in Muhlenberg County. The sheriff's department had decided to watch the tanks from time to time due to past thefts of anhydrous ammonia, which is used to make methamphetamine, from the property.

At approximately 12:47 a.m., the officers left Bickett Farms and traveled for about half of a mile on Kentucky Highway 175 when they observed a truck stopped on a side road next to the highway. Two men were standing next to the truck. The officers pulled over behind the truck to see if the individuals needed help and to investigate because of the truck's proximity to Bickett Farms at that time of night. McGehee testified that people stealing anhydrous ammonia from Bickett Farms had previously used that road as a place to park their vehicles and to access the property on foot. While Chambers called in the truck's license plate number to dispatch, McGehee exited his vehicle and began speaking to the two men standing next to the truck, one of whom was Parks.

The men told McGehee that their vehicle had broken down on their way to see a girl in Livermore. McGehee noticed that the men were nervous and

would not make eye contact with him. As McGehee approached the truck, he shined his flashlight through the open passenger door and saw a hose with a connector valve wrapped in black electrical tape attached to it on the floor of the truck. McGehee testified that anhydrous ammonia thieves had left similar hoses at Bickett Farms in the past and that he had also seen this type of hose at methamphetamine cook sites.

When McGehee saw the hose, he asked the two men to step to the rear of the truck. He shined his flashlight into the bed of the truck and saw a black air tank with no hose attached to it. McGehee also noticed that the tank had a valve that had turned a dark green color. McGehee noted that valves commonly turn green or blue when a tank contains anhydrous ammonia and that many anhydrous ammonia thieves painted such tanks black, brown, or camouflage in order to conceal them from detection.

Parks and the other individual were subsequently detained, and McGehee called more police officers to the scene. McGehee indicated that he believed the men had committed a criminal offense at this point because they were in possession of two items commonly used in the manufacturing of methamphetamine. McGehee nevertheless asked Parks for consent to search the truck, but Parks denied that it belonged to him. He later recanted and told McGehee that the truck was his but that he had just gotten it back from the shop, so some things in the truck might not belong to him.

Approximately one hour later, Chief Special Deputy Shannon Albro and Deputy Tommy Nantz arrived on the scene. McGehee testified that he heard Parks give Albro consent to search his truck, and Nantz performed a warrantless search. Nantz testified that he did not hear Parks give Albro permission to search the truck but that Albro had told him that such permission had been given. Nantz also indicated that Parks was under arrest at the time the search was performed. The search ultimately produced thirty-eight pseudoephedrine pills, eight lithium batteries, clear tubing, and a green hose that tested positive for anhydrous ammonia.

On June 15, 2007, the Muhlenberg County grand jury charged Parks in an indictment with manufacturing methamphetamine, second or subsequent offense; possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, second or subsequent offense; possession of marijuana, less than eight ounces; and being a second-degree persistent felony offender. On June 25, 2007, Parks appeared in open court with counsel and entered a plea of "not guilty" to all charges.

On December 14, 2007, Parks filed a motion to suppress any evidence seized from his truck at the time of his arrest on the grounds that his detention and the resulting warrantless search of the truck were illegal. Parks contended that he did not give the police consent to search the vehicle and that the police had neither probable cause nor reasonable suspicion of criminal activity that justified a search and seizure. Following an evidentiary hearing, the trial court entered an order on

December 18, 2007, denying the motion to suppress. The court explained its decision as follows:

> The Defendant primarily argues that this was a warrantless search, and the police must have a reasonable, articulable suspicion that a crime was being committed before the police can detain the defendant beyond the initial investigatory stop. Defendant further argues that once the police determined that no traffic violations were being committed, he should have been free to leave. This Court must disagree with the Defendant.
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> At the time Officer McGehee observed the hose in the passenger side of the truck and the tank in the bed of the truck, Officer McGehee had a reasonable, articulable suspicion that a crime was being committed, being either the theft of anhydrous ammonia or the possession of the equipment used in the manufacturing of methamphetamine. In fact, Officer McGehee had probable cause to believe that evidence of a crime was in the vehicle.
>
> The Defendant gave verbal consent to Deputy Albro to search the vehicle. One of the exceptions to the prohibition against warrantless searches is the consent to search. In addition, and in absence of any consent, the officers had probable cause to arrest the Defendant, and therefore, the search incident to arrest exception would also apply.

On January 7, 2008 – two days prior to his scheduled trial date – Parks filed a motion for a continuance so that his attorney could review his medical records in order to determine if there was a need for a competency hearing. Parks had apparently been involved in an automobile accident in March 2007 that resulted in brain trauma and left him in a coma for a few weeks. From speaking with Parks' family, defense counsel believed that Parks' injuries could have an

effect on his competency to stand trial and wanted to explore that possibility further. However, when defense counsel was asked by the trial judge if he had had any difficulty meeting with Parks, getting factual information from him, or preparing for trial, he could not point to any particular instances in which such problems had occurred. Defense counsel also noted that he was aware of Parks' medical history when he was first assigned the case in November 2007 but that he only realized its possible significance when he talked to Parks' family. The trial judge noted in response that a claim had not been made that Parks had suffered any memory loss as a result of the accident and that Parks' previous attorney (who had withdrawn from representation because of a conflict of interest) had never expressed any concern that Parks' competency was in issue. Therefore, Parks' motion for a continuance was denied.

Subsequently, on January 9, 2008, Parks filed a motion to enter an *Alford*[2] guilty plea to the charge of manufacturing methamphetamine after reaching a plea agreement with the Commonwealth. The guilty plea was conditional, as the agreement expressly indicated that Parks had reserved the right to suppress the trial court's suppression ruling. However, the agreement contained no language concerning the court's denial of Parks' motion for a continuance. Moreover, during the ensuing plea colloquy, the trial judge acknowledged that Parks had reserved the right to appeal the suppression decision but said nothing about whether the continuance issue was subject to review on appeal. Parks' counsel

[2] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

was similarly silent on this issue and raised no objections or corrections to the trial judge's statements in this regard. The trial court subsequently entered an order accepting Parks' guilty plea.

On January 24, 2008, the trial court entered a judgment finding Parks guilty of manufacturing methamphetamine and sentencing him to ten years' imprisonment. The judgment contained no language as to the issues preserved for appeal as part of Parks' conditional plea. This appeal followed.

ISSUES

Parks raises two grounds for relief on appeal. He first contends that the trial court erred when it denied defense counsel's motion for a continuance so that Parks' medical records could be obtained and reviewed to determine whether a competency hearing was necessary. Parks also argues that the trial court erred when it denied his motion to suppress evidence seized in the warrantless search. He specifically maintains that the officers did not obtain valid consent to search his truck and that they lacked probable cause to arrest him, resulting in an invalid search incident to arrest. We will address the continuance and suppression issues in turn.

1. Motion for a Continuance

Parks first contends that the trial court erred in denying his motion for a continuance so that his attorney could review his medical records. The Commonwealth argues in response that Parks has failed to properly preserve this

issue for appellate review because he did not reserve the issue in writing when he entered his conditional guilty plea. The Commonwealth relies upon Kentucky Rules of Criminal Procedure (RCr) 8.09, which provides:

> With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal. (Emphasis added).

The Commonwealth notes that Parks failed to specify the continuance issue in writing as part of his plea and, therefore, the issue should be deemed waived.

However, in the Supreme Court of Kentucky's recent opinion in *Dickerson v. Commonwealth,* 278 S.W.3d 145 (Ky. 2009), the Court afforded some leniency to defendants when it comes to determining whether an issue raised on appeal from a conditional guilty plea is properly preserved for review. The Court held that it would consider such issues on appeal only if they:

> (1) involve a claim that the indictment did not charge an offense or the sentence imposed by the trial court was manifestly infirm, or (2) the issues upon which appellate review are sought were expressly set forth in the conditional plea documents or in a colloquy with the trial court, or (3) if the issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy.

Id. at 149. Here, Parks makes no claim that the indictment failed to charge an offense or that the sentence imposed against him was somehow infirm. It is also apparent that the continuance issue was not expressly set forth as a ground for

review in the conditional plea documents or in Parks' plea colloquy with the trial court. Therefore, if this issue is to be considered preserved for our consideration, we must determine if it was sufficiently brought to the trial court's attention as an issue upon which appellate review was sought before Parks' guilty plea was entered.

As indicated above, Parks' counsel argued two days before entry of Parks' conditional guilty plea that a continuance was necessary in order for him to review Parks' medical records. Subsequent to the trial court's denial of this motion, Parks entered his plea. Thus, it could perhaps be argued that the trial court was aware of the issue. However, there is nothing in the record that could leave one to reasonably believe that Parks expressed a wish to pursue the issue on appeal. The plea documents made specific reference only to the suppression issue in terms of what was being preserved for review, yet Parks' counsel made no efforts to "correct" this detail. Moreover, the trial judge explicitly told Parks during the plea colloquy that the suppression issue could be raised on appeal but made no reference whatsoever to the continuance issue. Nonetheless, Parks' counsel made no efforts to argue that he also wished to pursue the latter as an avenue for relief. While *Dickerson* certainly affords a defendant leeway in terms of preserving an issue for appeal as part of a conditional guilty plea, we do not believe that a sufficient showing has been made here that Parks wished to reserve the continuance issue as part of his plea agreement. Therefore, we agree with the Commonwealth that the issue is not properly before us on appeal.

Even assuming, however, that the issue was preserved for our review, no error can be found here. "The granting of a continuance is in the sound discretion of a trial judge, and unless from a review of the whole record it appears that the trial judge has abused that discretion, this court will not disturb the findings of the court." *Williams v. Commonwealth*, 644 S.W.2d 335, 336-37 (Ky. 1982). Therefore, "a conviction will not be reversed for failure to grant a continuance unless that discretion has been plainly abused and manifest injustice has resulted" *Taylor v. Commonwealth*, 545 S.W.2d 76, 77 (Ky. 1976).

The standard used by trial courts for deciding whether to grant a continuance is set forth in RCr 9.04, which provides in relevant part that "[t]he court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial." In this case, defense counsel offered no evidence that he was having a hard time communicating with his client or that his client did not understand the legal proceedings or the charges against him. Instead, he merely stated that Parks had been in a car accident in 2007, in which he suffered a number of serious injuries, and that his family had noticed a change in his personality since that time. Defense counsel could not point to any instances in which he had had difficulty communicating with Parks or any other facts that would bring Parks' competency into issue. Instead, he indicated that he just wanted to look into Parks' medical records regarding the accident to see if anything therein might merit a competency hearing. He further informed the court that he did not know how long this investigation would take. We believe that

based on the record and defense counsel's arguments, Parks failed to show sufficient cause to support the granting of a continuance. Therefore, we cannot say that the trial court abused its discretion in denying his motion for such, and this claim of error must consequently be rejected. Parks' alternative claim that this case should be remanded for a competency hearing is similarly unavailing.

2. Motion to Suppress

Parks next argues that the trial court erred when it denied his motion to suppress evidence seized by police in the warrantless search of his vehicle. He contends that the search was warrantless on two grounds. First, the police did not obtain valid consent to search. Second, the police lacked probable cause to arrest him and, as a result, could not conduct a valid search incident to arrest.

The standard of review for the denial of a motion to suppress is set forth in *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky. App. 2002). It "requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive." *Id.* at 923; *see also* RCr 9.78. "Based on those findings of fact, we must 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." *Neal*, 84 S.W.3d at 923.

In this case, the police did not obtain a search warrant before they searched Parks' truck. Therefore, the Commonwealth has the burden of showing that the search fits within an exception to the warrant requirement in order to be allowed to use the seized evidence at trial. *Gallman v. Commonwealth*, 578

S.W.2d 47, 48 (Ky. 1979). There are two exceptions to the warrant requirement pertinent to this case: consent to search and search conducted incident to a valid arrest.

"Consent to search is an exception to the warrant requirement." *Farmer v. Commonwealth*, 169 S.W.3d 50, 52 (Ky. App. 2005). Parks argues that he did not consent to the search of his truck and that the Commonwealth did not meet its burden of showing by a preponderance of the evidence, through clear and positive testimony, that valid consent to search had been obtained. The trial court concluded that consent had been given; therefore, we must determine if this conclusion was supported by substantial evidence. *Neal*, 84 S.W.3d at 923. At the suppression hearing, Deputy McGehee testified that he personally heard Parks give Deputy Albro consent to search the vehicle. While it obviously would have been preferable for Detective Albro to give testimony on this issue, Parks presented no evidence to refute McGehee's statement. Therefore, the facts provided at the suppression hearing support the trial court's conclusion that Parks gave consent to search in this case.

Parks attempts to salvage his position by contending that he was coerced into consenting to a search of his truck because he was detained for an hour before he was asked for consent, because he was handcuffed when asked to give consent, and because several police officers were present when he was asked to give consent. Because of these facts, Parks argues that this show of authority coerced him to give consent to search against his will. Parks notes that consent to

search must be "voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854 (1973). While Parks presents an interesting argument, the Commonwealth correctly observes that he failed to raise this issue before the trial court. Therefore, it is unpreserved for our review. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) ("It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court."); *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) ("[A]ppellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.").

Even assuming that valid consent to search was not given in this case, however, we believe that the trial court did not err in finding that the police had probable cause to arrest Parks; therefore, the search-incident-to-arrest exception to the warrant requirement applied. "Our Supreme Court has recognized that a warrantless search preceding or following an arrest does not violate the constitution so long as probable cause existed to make the arrest prior to the search." *Lynn v. Commonwealth*, 257 S.W.3d 596, 598 (Ky. App. 2008). Deputy Nantz testified that Parks was under arrest when the other police officers arrived to conduct their search. Therefore, the question is whether probable cause existed to support his arrest based on the facts as they stood at the time of the officers' arrival.

Initially, the police approached Parks and his companion because their truck had stalled and to investigate why they were so close to Bickett Farms in the middle of the night. Deputy McGehee testified that the side road on which the men were found had been commonly used by individuals as an entry into the Bickett property for the theft of anhydrous ammonia. During this encounter, McGehee observed, in plain view, two items that he recognized as being commonly used in the manufacturing of methamphetamine: a hose with a connector valve wrapped in black electrical tape attached to it along with a black air tank with a valve that had turned a dark green color. McGehee noted that valves commonly turn green or blue when a tank contains anhydrous ammonia and that many anhydrous ammonia thieves painted such tanks black, brown, or camouflage to conceal them from detection. McGehee testified that he believed the men had committed a criminal offense at this point because they were in possession of two items commonly used in the manufacturing of methamphetamine; therefore, probable cause existed for an arrest. *See* KRS 218A.1432(1)(b) ("A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully . . . [w]ith intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine."). Parks argues that based on these facts there was insufficient probable cause to support an arrest. We disagree.

McGehee articulated in his testimony that the side roads near Bickett Farms were often used for accessing that property and stealing anhydrous

ammonia. Further, he testified that the aforementioned equipment found in plain view in Parks' truck is typically used in the manufacturing of methamphetamine. Based on these facts, McGehee had an objective basis to believe that Parks was engaged in criminal activity and, thus, probable cause to arrest him and to search the vehicle. Accordingly, the search-incident-to-lawful-arrest exception to the search warrant requirement was applicable here, and the trial court did not abuse its discretion by denying Parks' motion to suppress evidence.

The judgment of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

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