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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001618-MR

JAMES KENNETH DECOURSEY

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 11-CR-00135

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

DIXON, JUDGE: The appellant, James DeCoursey, appeals an order of the Christian County Circuit Court declining to suppress evidence obtained from a warrantless entry into his residence. However, because the entry was justified by exigent circumstances, we affirm.

On January 22, 2011, Detective Berghammer and two deputies of the Christian County Sheriff's Office went to 4260 Dawson Spring Road to serve arrest warrants on DeCoursey and Ricky Atwell. Upon arriving at the residence, Detective Berghammer smelled a strong chemical odor emanating from the house and noticed security cameras on its exterior. Detective Berghammer knocked on the door of the residence, but no one answered. He observed two vehicles in the driveway, and noticed a fan running in the attic. While waiting for someone to answer the door, Detective Berghammer observed several plastic bottles with tubing coming out lying on the front porch. Detective Berghammer associated them with the production of methamphetamines, and referred to them as "smoke bottles."

In light of this discovery, and the chemical smell that he also associated with methamphetamine production, Detective Berghammer contacted the Commonwealth's Attorney's Office. After making the call, he approached the residence. Before he could force entry, Ms. DeCoursey came to the door. When the door opened, Detective Berghammer could smell ether and anhydrous ammonia. Detective Berghammer and his deputies immediately secured Ms. DeCoursey and did a sweep of the residence. He found one subject in the bathtub and one in the back bedroom closet. In plain view, there were jars containing chemicals associated with methamphetamine production, starting fluid cans, two modified LP tanks associated with the illegal transport of anhydrous ammonia, and suspected methamphetamine on a tray with foil strips. Detective Berghammer left his deputies and went to seek a search warrant.

DeCoursey was indicted for manufacturing methamphetamine, possession of anhydrous ammonia, tampering with anhydrous ammonia, TBUT (anhydrous) with intent to manufacture meth, possession of a controlled substance (methamphetamine) in the first degree, and possession of marijuana. DeCoursey then filed a motion to suppress the evidence obtained during the sweep of the residence which ultimately led to the acquisition of a search warrant. Prior to denying his motion to suppress, the court conducted an evidentiary hearing. The court concluded that, based on Detective Berghammer's testimony, including his extensive experience investigating methamphetamine cases, there were sufficient safety concerns to justify a warrantless entry into the home. DeCoursey filed a conditional guilty plea, pursuant to Kentucky Rules of Criminal Procedure 8.09, reserving his right to appeal the circuit court's denial of his motion to suppress.

In his motion to suppress, DeCoursey asserted there were no exigent circumstances warranting the warrantless entry into his residence. When considering this argument, we will not disturb the circuit court's findings of fact if they are supported by substantial evidence. *Drake v. Commonwealth*, 222 S.W.3d 254, 256 (Ky. App. 2007). However, the circuit court's legal conclusions are reviewed *de novo*. *Id.* At the outset, it is important to note that Detective Berghammer did not conduct a full search of the apartment, but rather did a sweep of the residence and waited to search the entirety of the residence until after securing a warrant. However, even if we assume that the entry did constitute a search, for the reasons set forth below, it was warranted by exigent circumstances.

An exception to the warrant requirement exists when “considering the totality of the circumstances, an officer reasonably believes that an immediate search or seizure is necessary in order to avoid ‘risk of danger to police or others.’” *Pate v. Commonwealth*, 243 S.W.3d 327, 331 (Ky. 2007). There must be both probable cause and exigent circumstances for the exception to apply. *Kirk v. Louisiana*, 536 U.S. 635, 638, 122 S.Ct. 2458, 2459, 153 L.E.2d 599 (2002).

Kentucky recognizes the “plain smell” rule, which is akin to the “plain sight” rule, whereby an officer may infer probable cause based on the smell of illegal substances. *Cooper v. Commonwealth*, 577 S.W.2d 34, 36 (Ky. App. 1979), *overruled on other grounds by Mash v. Commonwealth*, 769 S.W.2d 42, 44 (Ky. 1989). Detective Berghammer, based on his years of experience, knew the odors emanating from the home were associated with methamphetamine production. However, Detective Berghammer’s suspicion was not simply based on smell, but on his observation of tools used for methamphetamine production located outside the home. It is well settled that an active methamphetamine lab presents a significant danger both to the public and the police because of the high risk of explosion and exposure to toxic fumes. *See Pate*, 243 S.W.3d at 331; *United States v. Atchley*, 474 F.3d 840, 850 (6th Cir. 2007).

Under the totality of the circumstances, it is clear there was probable cause for Detective Berghammer to believe there was an active methamphetamine laboratory on the property. The objects located in plain view outside the home, in combination with the smell of chemicals, were sufficient to create exigency and

justify a search of the residence. Despite this fact, Detective Berghammer merely conducted a sweep to secure and clear the residence in the interest of safety.

Therefore, because the initial entry into the residence and the sweep were based on probable cause and justified by exigent circumstances, the decision of the circuit court is affirmed.

MOORE, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Frankfort, KY

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky