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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001156-MR

ONES LEROYCE BARLOW — APPELLANT

v.

APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHILIP R. PATTON, JUDGE
ACTION NO. 12-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: Ones Leroyce Barlow appeals his conviction from the Metcalfe Circuit Court for manufacturing methamphetamine, possession of methamphetamine, possession of drug paraphernalia, and possession of marijuana. Barlow argues that the search warrant was not based on probable cause and that the

jury instructions allowed for a double jeopardy violation. Because we agree that the jury was improperly instructed, we reverse the judgment of conviction.

Pursuant to a search warrant, police searched Barlow's property and discovered methamphetamine, marijuana, and various items thought to be used in the manufacture of methamphetamine in Barlow's house, storage shed, and yard. The search warrant was issued based on an affidavit by Deputy Josh Neal of the Metcalfe County Sheriff's Department, which recited information provided by a confidential informant regarding Barlow's prior drug activities and the possibility that Barlow might possess, and possibly manufacture, some methamphetamine that evening. When the police placed Barlow under arrest, he stated that all of the items discovered were his.

Barlow was indicted by a grand jury for manufacturing methamphetamine, possession of methamphetamine, possession of drug paraphernalia, possession of marijuana, and trafficking in methamphetamine. Barlow moved to suppress the evidence seized pursuant to the search warrant, arguing that no probable cause existed to support the affidavit because the information concerning Barlow's past drug activities was stale and the other observations did not support that any illegal activity was taking place. The Commonwealth objected to the motion, arguing that the search warrant was valid. Following a hearing, the trial court denied the motion to suppress, finding that "there was ample probable cause for the issuance of the search warrant and in any event, Deputy Neal acted in good faith." The trafficking charge was later

dismissed by agreement, and Barlow was ultimately convicted by a jury of all other charges, resulting in a twelve-year sentence. Barlow appeals from the judgment of conviction.

Barlow's first argument addresses whether the affidavit on which the search warrant was based was supported by probable cause. The affidavit was based on information provided to Deputy Neal by a confidential informant regarding past and potential future drug use and manufacturing on Barlow's property. Deputy Neal testified that he had received reliable information from this informant in the past. Barlow argues that the affidavit did not state specific timeframes and that the information it contained was therefore stale. The affidavit stated as follows:

> A confidential informant who has provided reliable information in the past to Affiant and the Sheriff's department advised the officer that he had been asked to purchase Sudaphed [sic] pills by Leroyce Barlow. The informant stated that he has seen Barlow crushing up pills for making methamphetamine in the past. Also that he had smelled a strong chemical smell at the storage building and that Barlow kept the door closed and was very secretive about the storage building. The informant said he had seen Freddie Barlow come to Leroyce Barlow's house earlier today and that Freddie Barlow always comes with pills to make meth right before it is cooked at the storage building with the green door behind the residence. Donnie Watt, a neighbor to Barlow, was smoking meth earlier today and said that he was almost out of meth but that there would be some available later tonight. The informant took that to mean that that [sic] Barlow was going to cook methamphetamine tonight. Further the informant said that a woman named Jane who lives behind the Freeze brought a pharmacy bag with stuff in it to Leroyce Barlow today. It has been the

> informant's experience that if they are buying Sudafed today, they cook the same night beginning about 1:00 a.m. Informant has been there when the chemical fumes are really strong. Informant says that sometimes ingredients or items used to make it are in the house in a desk and in places in the residence. Informant said Barlow disposes of the items used to make meth in a burn pile in a burrow, like a drum.

In the affidavit, Deputy Neal described the independent investigation he conducted, which consisted of questioning the informant "extensively about the activities at that residence and [he] received detailed descriptions of the area where the cooking takes place."

The standard of review for determining whether probable cause existed at the time the warrant was issued is the "totality of the circumstances test" as described in *Beemer v. Commonwealth*, 665 S.W.2d 912 (Ky. 1984). The *Beemer* Court adopted the federal standard outlined in *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983), as follows:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and the "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Jones v. United States*, [362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960)].

See Beemer, 665 S.W.2d at 914-15. In *Commonwealth v. Pride*, 302 S.W.3d 43 (Ky. 2010), the Supreme Court of Kentucky further explains the role of the appellate court in reviewing a finding of probable cause:

> The proper test for appellate review of a suppression hearing ruling regarding a search pursuant to a warrant is to determine first if the facts found by the trial judge are supported by substantial evidence, and then to determine whether the trial judge correctly determined that the issuing judge did or did not have a "substantial basis for ... conclud[ing]" that probable cause existed. In doing so, all reviewing courts must give great deference to the warrant-issuing judge's decision. We also review the four corners of the affidavit and not extrinsic evidence in analyzing the warrant-issuing judge's conclusion.

Id. at 49 (citations omitted) (quoting *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331).

"Whether information supporting probable cause is stale 'must be determined by the circumstances of each case.'" *Lovett v. Commonwealth*, 103 S.W.3d 72, 80 (Ky. 2003) (quoting *Sgro v. United States*, 287 U.S. 206, 210–11, 53 S.Ct. 138, 140, 77 L.Ed. 260 (1932)). In *Lovett*, the Supreme Court of Kentucky found that the informant's information "indicated that Appellant's methamphetamine manufacturing operation was an ongoing, long-term activity, creating a reasonable inference that evidence of wrongdoing would still be found on the premises even after a lapse of as long as two months." *Lovett*, 103 S.W.3d at 80.

Although the affidavit in this case did not report specific dates and times as to past criminal behavior, it did provide facts that tended to establish that

Barlow might manufacture methamphetamine that evening and that there was a reasonable likelihood that evidence would be on the property at that time. The informant saw a person who had previously provided methamphetamine manufacturing supplies to Barlow arrive at the house that day. The informant also saw another woman that day bring a bag from a pharmacy to Barlow's residence. The informant spoke with a neighbor, whose comments tended to indicate that methamphetamine would be produced that night. Finally, the informant provided information about the likelihood of Barlow manufacturing methamphetamine, as well as a general timeframe, on days during which supplies used to manufacture methamphetamine were obtained. Although each of these facts individually might not be enough to support the existence of probable cause, together they indicated that Barlow's participation in the production of methamphetamine was ongoing and created a reasonable inference that evidence of wrongdoing would be found on Barlow's property that evening. The information in the affidavit was not stale because it "indicated that Appellant's methamphetamine manufacturing operation was an ongoing, long-term activity." *Lovett*, 103 S.W.3d at 80. The issuing judge therefore had "a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Pride*, 302 S.W.3d at 49 (quoting *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331).

Barlow also argues that there was no nexus between any suspected criminal activity and the property. Barlow claims that since the police officer who prepared the affidavit also obtained and executed the search warrant, the officer is

not entitled to a good faith exception to the exclusionary rule. The exclusionary rule prohibits the introduction of evidence obtained through an unlawful search. *Murray v. United States*, 487 U.S. 533, 536, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). The good faith exception to the exclusionary rule allows the introduction of evidence seized in violation of a defendant's Fourth Amendment rights if the executing officer acted reasonably within the scope of a facially valid warrant. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1988); *see also Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992).

The affidavit here contained sufficient information to allow the issuing magistrate to find that there was probable cause that contraband or evidence of a crime would be found at Barlow's home. The confidential informant upon whom the affiant relied had previously been a reliable source of information. This informant had seen Barlow crush up pills to be used in the manufacture of methamphetamine in the past, saw known associates of Barlow stop by the home on the day of the search, and provided information about the usual timeframe for manufacture as well as how Barlow usually disposed of materials used in the methamphetamine production process. The issuing judge had a substantial basis for concluding that probable cause existed, and Barlow's argument that there was no nexus between suspected criminal activity and the property is unfounded. Because the search warrant is valid, no further discussion of the good faith exception is necessary. Accordingly, we find no error in the trial court's denial of Barlow's motion to suppress.

For his second argument, Barlow contends that the jury instructions impermissibly allowed for the possibility of double jeopardy. Although Barlow failed to properly preserve this issue in the trial court, we "address it under the authority of *Sherley v. Commonwealth*, Ky., 558 S.W.2d 615, 618 (1977) ("failure to preserve this issue for appellate review should not result in permitting a double jeopardy conviction to stand")[.]" *Beaty v. Commonwealth*, 125 S.W.3d 196, 210 (Ky. 2003). We agree with Barlow that the trial court did not properly instruct the jury.

Barlow was found to be in possession of two bags containing methamphetamine as well as various items thought to be used in its manufacture. He was charged under the manufacturing and possession statutes. Instruction No. 4 reads as follows:

> COUNT 1: MANUFACTURING METHAMPHETAMINE
>
> You will find the defendant guilty of Manufacturing Methamphetamine under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt that in this count on or about April 3, 2012, and before the finding of the indictment herein
>
> A. He knowingly manufactured methamphetamine;
>
> OR
>
> B. He knowingly had in his possession with the intent to manufacture methamphetamine two or more of the chemicals, and/or two or more of the items of equipment for its manufacture.

Instruction No. 5, in turn, reads as follows:

COUNT 2: FIRST-DEGREE POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE)

You will find the Defendant guilty of First-Degree Possession of a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all of the following:

A. That in this county on or about April 3, 2012, and before the finding of the Indictment here, he had in his possession a quantity of methamphetamine;

AND

B. That he knew the substance so possessed by him was methamphetamine.

The Fifth Amendment to the United States Constitution prohibits a defendant from being subjected to multiple prosecutions for the same course of conduct. *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Kentucky has codified this rule in KRS 505.020(1).

The Supreme Court of Kentucky has previously addressed this issue in the case of *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003). The appellant in *Beaty* was convicted of both manufacturing and possession of methamphetamine. The court divided its analysis, addressing first whether the possession and manufacturing statutes each required proof of an element that the other did not.

The *Beaty* court held that, under KRS 218A.1432(1)(a),[1] it is not possible to manufacture methamphetamine without possessing it. *Id.* at 212. The court noted that this holding would not apply in a similar situation where someone was instead charged under KRS 218A.1432(1)(b)[2] because that definition does not require a showing of having actually manufactured methamphetamine, but rather requires evidence of possession of the chemicals or equipment necessary to do so. *Id.*

The *Beaty* Court went on to discuss whether the two convictions were predicated on the same offense, stating that the appellant would be "properly convicted of both possessing methamphetamine and manufacturing methamphetamine pursuant to KRS 505.020(1) if the methamphetamine that he was convicted of possessing was not the same methamphetamine that he was convicted of manufacturing." *Id.* at 213. The appellant in *Beaty* had been in possession of two quantities of methamphetamine, and the court held that the jury instructions needed to state that the convictions for manufacturing and possession must be based on different quantities. The court indicated that, to avoid a double jeopardy violation, the instructions for possession of methamphetamine should have also stated "that the substance so possessed by him was not a product of the

[1] KRS 218A.1432(1)(a) provides that "a person is guilty of manufacturing methamphetamine when he knowingly and unlawfully manufactures methamphetamine."

[2] KRS 218A.1432(1)(b) states that "a person is guilty of manufacturing methamphetamine when he knowingly and unlawfully with intent to manufacture methamphetamine possesses two (2) or more items of equipment for the manufacture of methamphetamine."

same manufacturing process for which you have found him guilty under that Instruction." *Id.* The court discussed its reasoning as follows:

> "[B]ecause Instruction Number 9 [for possession of methamphetamine] did not require the jury to distinguish between the two offenses, we cannot know that the jury convicted Appellant of possession of methamphetamine that was not a product of the manufacturing process for which he was also convicted under Instruction No. 8. *See Miller v. Commonwealth,* 77 S.W.3d 566, 576 (Ky. 2002) ("Whether the issue is viewed as one of insufficient evidence, or double jeopardy, or denial of a unanimous verdict, when multiple offenses are charged in a single indictment, the Commonwealth must introduce evidence sufficient to prove each offense and to differentiate each count from the others, and the jury must be separately instructed on each charged offense.")."

Id. at 214.

In this case, the jury instruction for manufacturing methamphetamine included the possibility that the jury could find Barlow guilty under *both* definitions of manufacturing methamphetamine under KRS 218A.1432. The court in *Beaty* discussed the differences between these two definitions as they pertained to double jeopardy. The court noted that had the appellant in that case been indicted and found guilty under the portion of the statute corresponding to possession of two or more items used in the production of methamphetamine with intent to manufacture, then conviction for both possession and manufacture would be supported by the fact that each conviction would require proof of an element that the other would not. *See id.* at 210.

The ambiguity that the *Beaty* court found problematic is present in the jury instructions used in the court below. Instruction 4 included both definitions for manufacturing methamphetamine under KRS 218A.1432(1). It was possible that Barlow was convicted for manufacturing methamphetamine under Part A of Instruction 4, which would then trigger the requirement that the jury instructions as to the possession charge include the necessary distinguishing language under *Beaty*. Since Instruction 5 did not include that language, it was not clear whether Barlow was convicted of "possession of methamphetamine that was not a product of the manufacturing process for which he was also convicted." *Beaty*, 125 S.W.3d at 213. Therefore, the uncertainty that ultimately resulted in a double jeopardy violation in *Beaty* is present in this case. *See Id.*

The Commonwealth contends that the arguments made during the closing statements preclude a double jeopardy violation. We disagree. In *Dixon v. Commonwealth*, 263 S.W.3d 583, 593 (Ky. 2008), the Supreme Court of Kentucky addressed the issue of the effect of counsel's arguments on jury instructions as follows:

> It is a longstanding principle that a jury is presumed to follow a trial court's instructions, and those instructions must be based upon the evidence presented. But an attorney's arguments do not constitute evidence. So the arguments of counsel are not sufficient to rehabilitate otherwise erroneous or imprecise jury instructions.

Id. at 593 (citations omitted). Here, the jury instructions were imprecise in that they did not distinguish between whether the conviction for manufacturing would

be based on KRS 218A.1432(1)(a) or (1)(b); neither did they include the language required by *Beaty* distinguishing that Barlow was not convicted for possessing the same methamphetamine that he manufactured should he have been convicted under Part A of Instruction 4. Therefore under *Dixon*, even if the Commonwealth had argued that Barlow did not manufacture methamphetamine under the definition found in Part A of Instruction 4, such arguments are insufficient to cure the double jeopardy violation in the jury instructions.

Because the jury instructions did not include the language required by *Beaty* for avoiding double jeopardy in situations involving potential convictions for both possession and manufacture of the same quantity of methamphetamine, the jury instructions issued by the court below were in error and we must reverse Barlow's conviction.

Accordingly, the judgment of conviction and the sentence imposed by the Metcalfe Circuit Court are reversed, and this matter is remanded for a new trial in accordance with this opinion.

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

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