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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000469-MR

DAMON L. SHANKLIN APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NOS. 13-CR-002929 AND 15-CR-001450

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

KRAMER, CHIEF JUDGE: Damon L. Shanklin appeals the Jefferson Circuit Court's two judgments convicting him, in case number 13-CR-002929, of planting, cultivating or harvesting marijuana with the intent to sell or transfer more than five

plants and, in case number 15-CR-001450, of being a first-degree persistent felony offender. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Shanklin was indicted in circuit court case number 13-CR-002929 on the charges of: (1) possession of a handgun by a convicted felon; and (2) planting, cultivating or harvesting marijuana with the intent to sell or transfer five or more plants. In case number 15-CR-001450, he was indicted on the charge of first-degree persistent felony offender (PFO-1st).

In case number 13-CR-002929, Shanklin moved to suppress all tangible evidence and statements obtained by law enforcement concerning the case. He claimed that the evidence was seized as a result of an unconstitutional stop, an unreasonably long seizure, and without his consent. A hearing was held, and Shanklin was permitted to submit a post-hearing brief on the issues regarding his motion to suppress, which he submitted. Nevertheless, his motion was denied.

Shanklin's defense counsel moved to withdraw and Shanklin obtained new counsel through the public defender's office. Shanklin moved to reveal the identity of the confidential informant in this case who provided information to police. This information was used to obtain the warrant to search the home where the marijuana plants were found. Shanklin asserted that defense counsel was in need of the identity of any informant so that counsel could speak with the informant to determine whether the person was "involved in the case in any other respect, and whether that individual was motivated by any other factors to cause

the arrest of the defendant." Shanklin contended that "[i]f the informant had an ulterior motive to affect the arrest of the defendant, that evidence could potentially impeach the Commonwealth's entire case against the defendant." He further alleged that because he was charged with planting, cultivating, or harvesting the marijuana, either alone or in complicity, and no other person was charged for the purposes of the "complicity charge," it was important for the identity of the informant to be revealed. The circuit court denied Shanklin's motion to reveal the identity of the confidential informant.

The Commonwealth moved to amend the indictment to include a firearm enhancement to the charge of planting, cultivating or harvesting marijuana with the intent to sell or transfer five or more plants because Shanklin was allegedly in possession of a firearm in furtherance of his marijuana offense at the time he committed the offense. The circuit court granted the motion and amended that count of the indictment "to include the enhancement 'while in possession of a firearm,' pursuant to KRS[1] 218A.992," so that the jury would "be able to consider the entire penalty range available."

A jury trial was held in case number 13-CR-002929, and Shanklin was convicted of planting, cultivating, or harvesting marijuana with the intent to sell or transfer five plants or more while acting alone or in complicity with others. During the penalty phase of the trial, the jury first recommended a sentence of five years of imprisonment. The jury then convicted Shanklin on the PFO-1st charge in

[1] Kentucky Revised Statute.

circuit court case number 15-CR-001450. Shanklin moved for a new trial or for judgment notwithstanding the verdict, but his motion was denied. Shanklin was then sentenced to the five years of imprisonment for planting, cultivating, or harvesting marijuana with the intent to sell or transfer five plants or more, but that sentence was enhanced to ten years of imprisonment due to the PFO-1st conviction. The court then probated Shanklin's sentence for five years.

Shanklin now appeals, contending that: (1) the circuit court erred in denying his motion to suppress because there was no reasonably articulable suspicion upon which to perform the investigatory stop, and any tangible items seized from the search of his house should be suppressed as "fruit of the poisonous tree"; (2) the circuit court erred in denying his request for a jury instruction on the lesser-included offense of possession of marijuana; and (3) the circuit court abused its discretion in denying his motion to reveal the identity of the confidential informant without first holding an *in camera* hearing.

II. ANALYSIS

A. MOTION TO SUPPRESS

Shanklin first alleges that the circuit court erred in denying his motion to suppress because there was no reasonably articulable suspicion upon which to perform the investigatory stop, and any tangible items seized from the search of his house should be suppressed as "fruit of the poisonous tree." At the time the

suppression hearing in this case was held, RCr[2] 9.78 was in effect, and it governed pretrial motions to suppress.[3] The Kentucky Supreme Court addressed whether the change in the Rules of Criminal Procedure affects how an appellate court reviews a trial court's decision regarding a motion to suppress in *Simpson v. Commonwealth*, 474 S.W.3d 544 (Ky. 2015). In *Simpson*, the Court stated:

> RCr 9.78 provided that "[i]f supported by substantial evidence, the factual findings of the trial court shall be conclusive." Under RCr 9.78 we apply the two-step process adopted in *Adcock v. Commonwealth*, 967 S.W.2d 6 (Ky. 1998). First, we review the trial court's findings of fact under a clearly erroneous standard. Under this standard, the trial court's findings of fact will be conclusive if they are supported by substantial evidence. We then conduct a *de novo* review of the trial court's application of the law to the facts to determine whether its decision is correct as a matter of law.
>
> Effective January 1, 2015, RCr 9.78 was superseded by RCr 8.27. Unlike its predecessor, RCr 8.27 does not specifically address an appellate standard of review. However, CR[4] 52.01 provides that findings of fact shall not be set aside unless clearly erroneous. A finding supported by substantial evidence is not clearly erroneous. Consequently, the application of CR 52.01 leads us to the identical standard applied under RCr 9.78. Accordingly, while RCr 9.78 has been superseded, the standard of review for a pretrial motion to suppress . . . remains substantively unaffected.

Simpson, 474 S.W.3d at 546-47 (internal quotation marks, citations, and footnotes omitted).

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[2] Kentucky Rule of Criminal Procedure.

[3] The circuit court denied Shanklin's motion to suppress in July 2014. Subsequently, on January 1, 2015, RCr 9.78 was deleted, and motions to suppress became governed by the new RCr 8.27.

[4] Kentucky Rule of Civil Procedure.

The circuit court made the following factual findings:

On September 3rd, 2013[,] at approximately 5:15 p.m.[,] detectives conducting a narcotics investigation observed Shanklin exit 2429 Elliott Avenue in Louisville, KY 40211[,] and enter a blue Chevrolet, KY Tag #366JJD. The detectives performed an NCIC [National Crime Information Center] check on the tag, which returned a gold Chevrolet. Detectives approached Shanklin in the parking lot of a gas station on 26th Street and Broadway and asked for his ID. Shanklin became defensive, but gave his ID to the detectives. Police explained to him that they had observed him driving a vehicle that was not the same color as the vehicle to which the tags were registered and that they were conducting a narcotics investigation. Shanklin then became more agitated, and took a menacing stance, at which point detectives placed Shanklin in handcuffs for protection of both Shanklin and themselves. While Shanklin was held, a narcotics dog was en route to the scene, and arrived within 20 to 30 minutes. Once at the scene, the narcotics dog indicated on the trunk area of Shanklin's vehicle. A search of Shanklin's vehicle uncovered a small amount of marijuana in the trunk. At the same time Shanklin was stopped in the gas station parking lot, detectives continued to survey the home on Elliott Avenue. Detectives approached the home and knocked on the door, but no one answered. While knocking on the door, detectives smelled a strong odor of marijuana from the home.

While detectives continued to survey the home on Elliott Avenue, Detective Kevin McKinney filled out an affidavit to obtain a search warrant for the home on Elliott Avenue. This search warrant was obtained, at which point detectives discovered 55 marijuana plants and a handgun. Thereafter, Shanklin was indicted on one count of Possession of a Handgun by a Convicted Felon and One count of Planting, Cultivating, or Harvesting with Intent to Sell Marijuana.

The circuit court's factual findings are supported by the testimony provided at the suppression hearing. Consequently, they are binding for purposes of our review. *See Simpson*, 474 S.W.3d at 547 (citations omitted).

We now turn to conduct *de novo* review of the circuit court's legal conclusions in denying the motion to suppress. Even if we were to assume, for the sake of argument, that the stop of Shanklin was unconstitutional, the circuit court nevertheless properly denied Shanklin's motion to suppress because the search of his home was conducted pursuant to the search warrant. If the stop had been unconstitutional, Shanklin could have invoked the exclusionary rule to prevent any evidence obtained via an illegal search that was based upon the unconstitutional stop from being used against him. *See Horn v. Commonwealth*, 240 S.W.3d 665, 669 (Ky. App. 2007) (citation omitted). However, "if the police discovered the subject evidence from an 'independent source,' unrelated to their illegal conduct, the evidence can be admitted against a defendant despite his invocation of the exclusionary rule." *Horn*, 240 S.W.3d at 669. In *Horn*, the appellant alleged "that the search of [a] garage was unconstitutional because police illegally entered the garage without a warrant." *Horn*, 240 S.W.3d at 669. This Court found that because the search warrant in *Horn* "was based solely on information obtained from . . . two confidential informants prior to the forced entry of the garage, [this] constituted an independent source that was sufficiently distinguishable from the illegal forced entry of the garage." *Horn*, 240 S.W.3d at 670. The Court continued, holding that "[b]ecause the two informants provided the requisite

information which would authorize the search warrant prior to the illegal forced entry, the forced entry was purged of its illegality because it was not responsible for the discovery and seizure of the contraband." *Horn*, 240 S.W.3d at 670.

In the present case, Detective Kevin McKinney's affidavit in support of the search warrant, which the circuit court clearly found to be credible and Shanklin does not allege to be false, stated:

> Affiant received information from/observed:
>
> Detectives with LMPD [Louisville Metro Police Department] Narcotics received information that Damon L. Shanklin was cultivating marijuana in his home at 2429 Elliott Ave.
>
> Acting on the information received, affiant conducted the following independent investigation:
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> Detectives received information from a reliable confidential informant that has been proven reliable by giving information in the past on numerous occasions that has [led] to the arrest and seizure of narcotics. The confidential informant wishes to remain anonymous for his/her safety. Within the last 48 hours of this affidavit being drafted the confidential informant observed numerous marijuana plants inside 2429 Elliott Ave. Confidential reliable informant advises Damon L. Shanklin is the only occupant of the home. Under 97CR000993[,] Shanklin was charged [with trafficking in a controlled substance] cocaine[;] under 05F010338[,] Shanklin was charged [with possession of a controlled substance] cocaine and possession of marijuana[;] under 12F003973[,] Shanklin was charged [with trafficking in a controlled substance] cocaine. While detectives were getting a description of the home[,] a strong odor of marijuana could be smelled coming from [the] home.

A search warrant was issued based upon Detective McKinney's affidavit. The search of Shanklin's home that was conducted pursuant to the search warrant resulted in law enforcement finding 55 marijuana plants and a handgun.[5]

Thus, the warrant was issued based upon the information received from the confidential informant and the "strong odor of marijuana" detected coming from his home. However, on appeal, Shanklin does not challenge the search warrant to the extent that it was based upon information received from the confidential informant. Rather, he only argues that the "'strong odor of marijuana,' discovered while [Shanklin] was being detained at the illegal investigatory stop, formed a basis for the search warrant; therefore, the search warrant was not supported by an independent basis or source." Yet, Shanklin did not make this allegation in the circuit court, either in his motion to suppress, or in his "post-hearing brief in support of suppression." The only comment Shanklin made in the briefs he filed in the circuit court concerning the odor of marijuana was that the detectives' assertion that they could smell marijuana from outside the house was not verifiable. Because Shanklin's current claim about the reference to the "strong odor of marijuana" in the detective's affidavit in support of the search warrant was not raised in the circuit court, it is not preserved for our review. Consequently, we will not consider it for the first time on appeal. *See Kennedy v.*

[5] Although marijuana was found in Shanklin's car following the sniff search by the canine unit, the drug charges in this case concerned only the marijuana that was found in his home during the search pursuant to the search warrant.

Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976) *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010)).

Further, defense counsel told the circuit court during the suppression hearing that the defense was not challenging the search warrant itself; it was seeking to suppress the evidence found as a result of the execution of the search warrant because the defense believed that the search warrant would not have been issued but for the "illegal" stop and detention of Shanklin. However, the search warrant was obtained based upon information received from the confidential informant and upon the "strong odor of marijuana" that detectives smelled outside Shanklin's front door, not upon the stop and seizure of Shanklin at the gas station. As we noted above, Shanklin does not challenge the information received from the informant and his argument about the odor is not preserved for appellate review. Consequently, Shanklin's claim fails.

B. JURY INSTRUCTION

Shanklin next asserts that the circuit court erred in denying his request for a jury instruction on the lesser-included offense of possession of marijuana. He alleges that possession of marijuana is a lesser-included offense of cultivation of marijuana. We review a trial court's decision concerning jury instructions for an abuse of discretion. *See Cecil v. Commonwealth*, 297 S.W.3d 12, 18 (Ky. 2009) (internal citation omitted). A trial court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted).

"In a criminal case it is the duty of the court to prepare and give instructions on the whole law and this rule requires instructions applicable to every state of case deducible or supported to any extent by the testimony." *Kelly v. Commonwealth*, 267 S.W.2d 536, 539 (Ky. 1954) (citations omitted). "Evidence supporting [a lesser-included-offense] instruction does not necessarily need to come from the defendant himself, but may come from the prosecution." *Commonwealth v. Collins*, 821 S.W.2d 488, 491 (Ky. 1991).

Pursuant to KRS 218A.1423,

> (1) A person is guilty of marijuana cultivation when he knowingly and unlawfully plants, cultivates, or harvests marijuana with the intent to sell or transfer it.
>
> (2) Marijuana cultivation of five (5) or more plants of marijuana is:
>
> (a) For a first offense a Class D felony.
>
> (b) For a second or subsequent offense a Class C felony.
>
> . . . .
>
> (4) The planting, cultivating, or harvesting of five (5) or more marijuana plants shall be prima facie evidence that the marijuana plants were planted, cultivated, or harvested for the purpose of sale or transfer.

In *Commonwealth v. Swift*, 237 S.W.3d 193, 196 (Ky. 2007), the Kentucky Supreme Court held that possession of marijuana could, in some

circumstances, be a lesser-included offense of cultivation of marijuana. The Commonwealth asserts that *Swift* is distinguishable from the present case, however, because the Supreme Court held that Swift was entitled to the possession of marijuana instruction based upon Swift's own testimony that he was aware of the "marijuana plants and the potted seed growing on his property but the plants and seeds did not belong to him." Swift claimed that the marijuana had been placed there by his stepson. The evidence upon which Swift's cultivation of marijuana charge was based included "thirty marijuana plants and 172 potted marijuana seeds in the backyard . . . ." *Swift*, 237 S.W.3d at 194.

Swift is distinguishable from the present case. In the present case, the plants were not found growing outside in Shanklin's yard; they were found inside his house. Additionally, although Shanklin produced evidence at trial to show that some mail, including a three-year-old gas and electric bill, was addressed to other people at his address, he did not allege that anybody besides himself lived at that address. *See Swift*, 237 S.W.3d at 196 (discussing *Collins*, 821 S.W.2d at 491, and noting that no possession of marijuana instruction was warranted in *Collins* because the defendant in *Collins* "denied all knowledge of the marijuana's existence, meaning that there was no evidence to support a possession instruction."). Consequently, the circuit court did not abuse its discretion when it declined to instruct the jury on the lesser-included offense of possession of marijuana because there was no allegation that the marijuana was being grown by anyone but Shanklin in Shanklin's house.

C. CONFIDENTIAL INFORMANT'S IDENTITY

Finally, Shanklin contends that the circuit court abused its discretion in denying his motion to reveal the identity of the confidential informant without first holding an *in camera* hearing. He notes that defense counsel argued for the confidential informant's identity to be revealed because the informant had observed the plants in the home and because Shanklin believes the informant might be a perpetrator, based upon the fact that Shanklin was charged as having cultivated the plants alone or in complicity with another person, yet nobody else was charged in the case.

Pursuant to KRE[6] 508(a), the Commonwealth has "a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer . . . conducting an investigation." There are exceptions to this rule, however. The exception that Shanklin claims applies here states:

> If it appears that an informer may be able to give relevant testimony and the public entity invokes the privilege, the court shall give the public entity an opportunity to make an *in camera* showing in support of the claim of privilege. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavits. If the court finds that there is a reasonable probability that the informer can give relevant testimony, and the public entity elects not to

[6] Kentucky Rule of Evidence.

> disclose this identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one (1) or more of the following:
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> > (A) Requiring the prosecuting attorney to comply;
> >
> > (B) Granting the defendant additional time or a continuance;
> >
> > (C) Relieving the defendant from making disclosures otherwise required of him;
> >
> > (D) Prohibiting the prosecuting attorney from introducing specified evidence; and
> >
> > (E) Dismissing charges.

KRE 508(c)(2).

The Kentucky Supreme Court has noted that the United States Supreme Court held that "a proper balance regarding nondisclosure must depend on the particular circumstances of each case, taking into consideration the crimes charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors." *Heard v. Commonwealth*, 172 S.W.3d 372, 374 (Ky. 2005) (discussing *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct. 623, 1 L.Ed.2d 639 (1957)). "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Heard*, 172 S.W.3d at 374 (quoting *Roviaro*, 353 U.S. at 60-61, 77 S. Ct. at 628). The *Heard* Court noted that KRE 508(c)(2) provides that "the court is to

allow for an 'in camera' showing, *i.e.* hearing, of the parties' claims regarding the privilege." *Heard*, 172 S.W.3d at 374. The Court found that the circuit court had abused its discretion when it denied Heard's motions "without a formal hearing and finding." *Heard*, 172 S.W.3d at 374.

The *Heard* Court stated that

> a defendant who requests disclosure of the identity of an informant must first make a proper showing that an exception applies. Once Appellant has made such a showing, the burden would shift to the Commonwealth to overcome this inference. Factors a court would normally consider include whether the informant's life would be in danger were his identity revealed or if he is needed for other undercover work, etc.

Heard, 172 S.W.3d at 374 (citations omitted).

An *in camera* hearing is only required where it appears the informant may be able to provide relevant testimony. In the present case, Shanklin contends that the informant might be a perpetrator, based upon the fact that Shanklin was charged as having cultivated the plants alone or in complicity with another person, yet nobody else was charged in the case. However, the Commonwealth never produced evidence of another perpetrator, and Shanklin never alleged in the circuit court, nor does he allege on appeal, that another person was growing the marijuana plants in the house he occupied. Additionally, Shanklin never alleged that anybody else lived in the house. Therefore, Shanklin has not shown that the informant could have provided relevant testimony about another person being the

perpetrator. Consequently, pursuant to the facts of this case, the circuit court did not err in failing to hold an *in camera* hearing.

Moreover, "where the evidence shows that an informant was merely a tipster who [led] to subsequent independent police investigation which uncovers evidence of the crime, disclosure of the identity of the informant is not required." *Taylor v. Commonwealth*, 987 S.W.2d 302, 304 (Ky. 1998) (discussing how cases interpreted a statutory privilege against disclosure of the identity of a confidential informant prior to the adoption of KRE 508 in 1992). Based upon this precedent, the Court in *Taylor* held that the informant in that case only provided a tip to police that led to further investigation by law enforcement and, accordingly, the informant was not a material witness to the crimes and the informant's identity was protected by the KRE 508 privilege. *See Taylor*, 987 S.W.2d at 304.

In the present case, the informant was also just a tipster. The informant told law enforcement that he/she had seen marijuana plants in Shanklin's home within forty-eight hours preceding the search in this case. The tip from the informant led to further investigation and a search warrant being issued, which ultimately resulted in detectives finding the marijuana growing in Shanklin's house. Therefore, the circuit court did not err in denying Shanklin's motion to reveal the identity of the informant.

Accordingly, the Jefferson Circuit Court's judgments are affirmed.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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