IMPORTANT NOTICE

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RENDERED: JANUARY 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 2-9-06 E.I.A. Grantt P.C.

2004-SC-0956-MR

JOHN BRITT — APPELLANT

V.

APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
04-CR-0008

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, John Britt, was convicted in the Ballard Circuit Court of complicity to manufacture methamphetamine and engaging in organized crime. He was sentenced to a total of twenty-five years imprisonment and appeals to this Court as a matter of right. Ky. Const. § 110 (2)(b). For the reasons stated herein, we affirm the convictions.

FACTUAL BACKGROUND

Appellant was involved in a methamphetamine manufacturing operation along with seven other co-defendants: Teresa Collier (Appellant's mother), James Swann and his fianceé Amy Wilson (fugitives from Missouri), Jerry Layton (Collier's boyfriend), Jason Copeland, Angela Penrod (Appellant's girlfriend at the time), and Teresa Summers (Swann's mother, who has not been apprehended). Before trial, Swann,

Wilson, and Penrod all pled guilty in exchange for reduced sentences and testimony implicating the remaining defendants.

The Collier house was the subject of surveillance by the Ballard County Sheriff's Department for three weeks. The house was ultimately searched, and chemicals and equipment used to manufacture methamphetamine using the "red phosphorous" method were seized. The group also used a house on Hazelwood Road to cook methamphetamine. A search of this location also uncovered supplies for making methamphetamine.

Testimony showed Swann was the main cook of the methamphetamine, and Appellant was a protégé, of sorts. Members of the group routinely took turns purchasing ingredients for manufacturing methamphetamine in hopes the purchases would not raise suspicions. Amy Wilson also testified the group would keep some of the methamphetamine for personal use, and sell the rest of the batch for money to buy additional ingredients.

Appellant asserts six claims of error in this appeal: 1) sufficiency of the evidence on the KRS 506.120 (engaging in organized crime) charge; 2) double jeopardy; 3) trial court error in allowing amendment of the indictment; 4) sufficiency of the evidence on the complicity to manufacture methamphetamine charge; 5) trial court error in denying Appellant's motion to suppress evidence obtained during unconstitutional search and seizure; and 6) trial court error in denying motion to separate witnesses.

We find Appellant's claims are without merit; however, each argument is addressed below.

I.

Appellant first claims the trial court improperly denied his motion for directed verdict on the organized crime charge. Appellant argues the Commonwealth failed to prove Appellant was involved in trafficking in a controlled substance, one of the statutory qualifiers of a criminal syndicate under KRS 506.120(3). The crux of Appellant's complaint concerns the definition of "traffic" found in KRS 218A.010(28)[1]:

> Traffic, except as provided in KRS 218A.1431, means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance.

Appellant asserts that KRS 218A.1431 provides an exception to the general definition of "traffic" applicable only to methamphetamine offenses, whereby "manufacture" is not included in the definition. If this interpretation is correct, Appellant could not be convicted of organized crime because he was not trafficking in a controlled substance; rather, he was aiding the manufacture of methamphetamine, which is not an enumerated criminal syndicate statutory qualifier.

We disagree with Appellant's argument and find it unnecessary to conduct extensive statutory interpretation. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The organized crime statute does not require the Commonwealth to prove trafficking in a controlled substance actually occurred. Hill v. Commonwealth, 125 S.W.3d 221, 233 (Ky. 2004). Illegal trafficking is part of the definition of "criminal syndicate," and evidence of trafficking goes only to

[1] Appellant cites the former version KRS 218A.010; in 2005 the definitions were re-numbered and subsection 28 is now subsection 34.

prove the group qualified as a criminal syndicate under KRS 506.120(3)(e). Id. Accordingly, Appellant violated the organized crime statute once he "provided material aid" to maintain the criminal syndicate, in contravention of KRS 506.120(1)(b). As a result, the testimony and evidence presented by the Commonwealth was sufficient to present this issue to the jury.

II.

Appellant next alleges his convictions of complicity to manufacture methamphetamine and engaging in organized crime constitute double jeopardy. Appellant argues the organized crime charge stems from one incident of manufacturing methamphetamine, and manufacturing is also the basis for the complicity charge.

We look to the double jeopardy analysis set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). This Court interpreted the Blockburger test as, "whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not." Commonwealth v. Burge, 947 S.W.2d 805, 811 (Ky. 1996).

Sufficient proof was introduced to show Appellant furthered the activities of the criminal syndicate, and additional evidence proved Appellant manufactured methamphetamine with his co-defendants. Accordingly, we find no double jeopardy violation in this case because the statutory offenses of organized crime and complicity to manufacture methamphetamine each require proof of facts the other does not.

III.

Appellant next claims the trial court erred by allowing the Commonwealth to amend the date of occurrence listed on the indictment. Appellant argues "other bad acts" evidence was admitted because the original indictment listed only December 9,

2003, while the amended indictment included the month of November through December 9, 2003.

We disagree with Appellant's assertion. The trial court may allow amendment of the indictment if no new offense is charged, and the defendant is not substantially prejudiced. RCr 6.16. We do not find Appellant was substantially prejudiced by the amendment. The Commonwealth did not present evidence of uncharged offenses committed during the revised time period; rather, the evidence introduced at trial was offered to prove elements of the charged crimes.

Furthermore, in Gilbert v. Commonwealth, 838 S.W.2d 376, 378 (Ky. 1992), we upheld the amendment of an indictment altering the year the offense occurred. This Court noted, "[the defendants] were not surprised or misled by the indictment or its amendment." Id. In this case, we are likewise compelled to find the trial court did not abuse its discretion by allowing amendment of the indictment.

IV.

Appellant's fourth claim of error stems from the trial court's denial of a directed verdict of acquittal on the complicity to manufacture methamphetamine charge. Appellant contends he cannot stand convicted of complicity to manufacture because he did not possess all of the necessary chemicals or equipment required by Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003) (superseded by statute in KRS 218A.1432(1)(b) (2005) (now requiring possession of two or more chemicals or two or more items of equipment for the manufacture of methamphetamine).

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Benham, supra at 87.

Appellant opines there was no red phosphorous found, which is a required ingredient for the "red phosphorous" method of manufacturing methamphetamine. We disagree, however, because there was testimony that Appellant and his co-defendants manufactured methamphetamine at two different locations. At the Hazelwood house, a quantity of matchbooks with the covers and strike pads ripped off were found along with burned matchbooks found in a "burn barrel" in the backyard. This is sufficient circumstantial evidence that Appellant and his co-defendants possessed red phosphorous at some previous point in time. In Varble v. Commonwealth, 125 S.W.3d 246, 254 (Ky. 2004), we observed it is for the jury to deduce from the evidence whether all of the ingredients were possessed contemporaneously. Likewise, in Pate v. Commonwealth, 134 S.W.3d 593, 596 (Ky. 2004), we noted possession of methamphetamine ingredients could be actual or constructive. Furthermore, exercising dominion and control over the contraband demonstrates constructive possession, which need not be exclusive. Id. In this case, Appellant, Collier, and Layton each held a key to the Hazelwood house.

Accordingly, sufficient evidence was introduced for a jury to convict Appellant of complicity to manufacture methamphetamine. The trial court did not err by denying Appellant's motion for a directed verdict of acquittal.

V.

Appellant next alleges the trial court erred by denying Appellant's motion to suppress evidence received from an unconstitutional search and seizure.

Employees of Sutton's Drugs notified the Ballard County Sheriff's Department regarding a suspicious woman who purchased pseudoephedrine tablets on repeated occasions. The employees described the woman as well as the car she was driving.

Acting on this information, Deputy Jones initiated a traffic stop of the vehicle, driven by Teresa Summers. After an initial denial, Summers admitted to purchasing the pills and delivering them to the Collier residence. Deputy Jones did not further detain Teresa Summers. After advising his superiors of the situation, he drove to the Collier residence with intent to secure the premises, concerned that Teresa Summers would "tip off' the occupants to destroy evidence because the police were suspicious.

Appellant responded to Deputy Jones' knock on the front door. Appellant moved aside and allowed Deputy Jones to pass through the doorway into the house. At this time Deputy Jones heard a toilet flush. The toilet was located behind a doorway that was covered by a hanging blanket. Deputy Jones ordered the occupants out of the bathroom. After no response, Deputy Jones removed the blanket, finding co-defendants Swann and Wilson flushing pseudoephedrine pills down the toilet. Deputy Jones did not search the dwelling further, but gathered the occupants in the front room and phoned the county attorney to secure a search warrant. At that time, Teresa Collier, the lessee of the house, arrived. Collier voluntarily consented to a search of the premises and executed a written consent form. Thereafter, additional officers entered the home and searched for evidence of manufacturing methamphetamine. After Swann was in custody, he admitted to flushing the pills and made other incriminating statements regarding manufacturing methamphetamine at the Collier residence and at the Hazelwood house.

It is fundamental that police cannot conduct a warrantless search of a private home absent exigent circumstances. Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky. 2003). On a motion to suppress, the trial court's findings of fact are conclusive if supported by substantial evidence. RCr 9.78. In this case the trial court

found the warrantless search constitutional on grounds that Deputy Jones entered the Collier home under exigent circumstances, and the subsequent search of the premises was conducted pursuant to written consent of the lessee.

We find there is substantial evidence to support the findings of the trial court. The Collier home had been under police surveillance for three weeks on suspicion the occupants were operating a methamphetamine lab. Additionally, the police had received information that Swann and Wilson, fugitives from Missouri, were staying at the Collier residence. The police had also witnessed Teresa Summers at the Collier house on numerous occasions, thereby corroborating the information obtained during the traffic stop conducted by Deputy Jones. Furthermore, the police knew the occupants of the Collier home purchased high-grade iodine (an ingredient in "red phosphorous" methamphetamine) from a local farm supply store the day before the traffic stop. Accordingly, as a matter of law we are bound by the findings of the trial court because we find no abuse of discretion or clear error.

We also note, however, it may be unnecessary to rely on the exigent circumstances exception in this case. Deputy Jones was allowed entry to the Collier home by Appellant, who is Collier's son. Therefore, it appears Deputy Jones lawfully entered the Collier home with Appellant's consent and secured the premises until Teresa Collier arrived and gave consent to a full search.

VI.

Appellant's final contention is the trial court erred by denying his co-defendant's motion to separate witnesses. Counsel for co-defendant, Layton, moved to separate witnesses after two of the Commonwealth's witnesses had already testified. Appellant concedes his defense counsel did not join the motion, nor make a separate motion for

separation. RCr 9.22 states a party claiming error must "mak[e] known to the court the action which that party desires the court to take or any objection to the action of the court . . . ." We find Appellant's claim is not preserved for our review because he failed to request separation of witnesses from the trial court.

Appellant alternatively urges review as palpable error. RCr 10.26. We find Appellant has not suffered substantial prejudice by failing to invoke separation of witnesses under KRE 615. "The rule was adopted to prevent witnesses who have not yet testified from altering their testimony in light of evidence adduced at trial." Justice v. Commonwealth, 987 S.W.2d 306, 315 (Ky. 1998). Appellant fails to show how he suffered prejudice, only mentioning Angela Penrod was able to hear the testimony of other witnesses before she testified. Appellant does not suggest any witness testimony was falsified or otherwise altered as a result of not being separated. See Id. Furthermore, we note that the trial court did grant separation of the primary witness for the Commonwealth, Amy Wilson, on the second day of the trial. Accordingly, we find no set of facts which rise to the level of palpable error.

CONCLUSION

For the foregoing reasons the judgment and sentence of the Ballard Circuit Court are affirmed.

Lambert, C.J., Cooper, Graves, Roach, Scott, and Wintersheimer, J.J., concur. Johnstone, J., concurs in result only.

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