IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: FEBRUARY 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000296MR

RICHARD ALLEN GEARY — APPELLANT

V.

ON APPEAL FROM UNION CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
NO. 04-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Richard Allen Geary, was convicted of conspiracy to theft of anhydrous ammonia with intent to manufacture methamphetamine[1] and of being a second degree persistent felony offender.[2] Appellant was sentenced to twenty (20) years imprisonment, and he appeals to this Court as a matter of right.[3] Appellant raises two claims of error: (1) that the trial court improperly denied his motion to suppress; and (2) that the trial court improperly refused to grant his motion for a directed verdict. Finding no merit to these claims, we affirm Appellant's convictions.

On March 11, 2005, Appellant (along with one of his co-defendants, Timothy Burden) filed a motion to suppress all evidence seized upon the argument that

---

[1] KRS 506.040 and KRS 514.030, a class C felony.
[2] KRS 532.080.
[3] Ky. Const. § 110(2)(b).

the "stop" was not justified under Terry v. Ohio.[4] The trial court held a suppression hearing on March 14, 2005, and denied the motion at the conclusion of the hearing. The deputy sheriff, Jason Thomas, the arresting officer in this case, was the only witness who testified at the hearing. The following facts are taken from the officer's testimony at the suppression hearing.

On February 19, 2004, at 1:40 in the morning, Deputy Thomas observed a car parked outside of Doug's Tanning World in Waverly, Kentucky. Due to a rash of burglaries in the area and the fact that the business itself had been burglarized multiple times in the past several years, the officer decided to pull into the parking lot in an effort to identify anyone at the closed business. Although he pulled in behind the car, he did not block it in, but instead left 15 to 20 feet between the two cars.

When Deputy Thomas pulled into the parking lot Appellant was out of the parked car, apparently getting a soft-drink at a soft-drink machine. The officer asked Appellant if he were getting a Coke to which Appellant answered in the affirmative. According to Deputy Thomas, Appellant seemed overly nervous while talking to him and Appellant returned to the car.

Deputy Thomas decided to approach the car. As soon as he got near the car, he could smell propane. Timothy Burden (Burden), the driver of the car, told the officer that they were coming from Evansville and going to Madisonville. This raised Deputy Thomas's suspicions because he did not think it made sense for them to be going through Union County if they were headed to Madisonville. Deputy Thomas said,

[4] 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

"You're kind of taking the long route, aren't you?", to which Burden replied, "Yeah, I guess so." The officer noticed that Burden was so nervous that he was shaking.

Deputy Thomas explained to Burden that he was identifying anyone at closed businesses due to burglaries in the area. The officer asked the men if they had any burglary tools with them, such as pliers. Although they said they did not, Deputy Thomas could see a pair of channel-lock pliers laying in the backseat next to another passenger, Jerry Oakley.

Deputy Thomas checked Burden's driver's license, and the check revealed no problems. The officer then asked the other passenger, Oakley, for his identification and discovered that the name and date of birth Oakley gave were false. After Deputy Thomas explained that it was a crime to lie to an officer, Oakley gave the correct information.

Oakley was asked to get out of the car. While patting him down for weapons the officer found a walkie-talkie in Oakley's pocket. After instructing Oakley to sit cross-legged, facing the highway, Deputy Thomas called for backup. Appellant was then removed from the car. Deputy Thomas found a walkie-talkie and a torch lighter on Appellant. According to the officer walkie-talkies are commonly used during the theft of anhydrous ammonia, because they enable the persons stealing the anhydrous ammonia to communicate with each other. Torch lighters are also used to heat pipes to smoke methamphetamine.

After getting Burden out of the car, Deputy Thomas asked Burden if there were any more burglary tools in the car. When Burden said there were not, Deputy Thomas asked for permission to look into the trunk and Burden consented. Inside the

trunk the officer found a propane tank with a loosened valve, an air tank with a discolored brass valve, and a garden hose with a plastic fitting taped to it. Deputy Thomas believed that the items found were going to be used for the theft of anhydrous ammonia. The valve that would have normally been on the air tank was replaced with a brass valve that had turned to a bluish-green color. According to the officer, only exposure to anhydrous ammonia would cause the valve to discolor in this way. Additionally, the plastic fitting taped to the garden hose would fit an anhydrous tank, allowing a person to extract anhydrous ammonia. Deputy Thomas had seen the same set-up just two days earlier on an anhydrous tank at a location 1.1 miles away from where the officer found Appellant and his colleagues. Inside the car, Deputy Thomas also found a large green duffle bag, and he testified that the green duffle bag would make it easier to carry the propane tank.

After arresting Burden, Oakley, and Appellant, Deputy Thomas told the men that he knew there was a place with anhydrous ammonia only 1.1 miles away from Doug's Tanning World and that he would be checking the location. He explained to them that he wanted to know if anyone was there in order to make sure no one got hurt. Oakley responded "No, we haven't got any, yet." This led Deputy Thomas to believe that the men had planned to steal anhydrous ammonia, but had not yet done so.

After the suppression hearing testimony, the trial court found that Deputy Thomas had noticed the men in a rural area at 1:40 a.m. in a place that had been burglarized several times. In addition, the men had a pair of pliers in the car. The trial court found that the officer had reasonable suspicion and overruled Appellant's motion to suppress the evidence.

After a one day trial which occurred on March 28, 2005, Appellant was found guilty of criminal conspiracy to theft of anhydrous ammonia with intent to manufacture methamphetamine. Appellant was further found guilty of being a second degree persistent felony offender and his sentence was fixed at twenty (20) years.

A. Motion to Suppress

The Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution prohibit unreasonable searches and seizures. Appellant claims his constitutional rights were violated when the trial court denied his motion to suppress the evidence which flowed from the search and seizure of Burden's vehicle and Oakley's property.

Normally a warrant must be obtained prior to any search and seizure. However, the United States Supreme Court has ruled that a police officer may stop and frisk a suspect, even absent probable cause, where the police officer has a reasonable suspicion that "criminal activity may be afoot."[5] Such encounters are a limited exception to the warrant requirement, and allow the police officer to perform a brief investigatory stop in circumstances where he has a reasonable articulable suspicion that a crime may be taking place.[6]

The United States Supreme Court has recognized that terms such as "articulable reasons" and "founded suspicion" are not self-defining and as a result fall short of providing "clear guidance dispositive of the myriad factual situations that arise."[7] Because of these reasons, the totality of the circumstances test must be used and the

---

[5] Id. at 30.
[6] Williams v. Commonwealth, 147 S.W.3d 1 (Ky. 2004).
[7] U.S. v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981).

officer must have a "particularized and objective basis for suspecting the particular person stopped of criminal activity" based on the whole picture.[8]

In denying Appellant's motion to suppress, the Circuit Court concluded that the totality of the circumstances justified the investigatory stop made by Deputy Thomas. Appellant was found outside of a closed business at 1:40 a.m. Not only had there been numerous burglaries in the area, the particular business had been burglarized on multiple occasions. Although location alone is not enough to support a reasonable suspicion, the fact that the stop occurred in a high crime area is among one of the relevant considerations in deciding whether the stop was justified.[9]

Deputy Thomas testified that when the encounter occurred Appellant appeared overly nervous. After approaching the parked car, Deputy Thomas could smell propane. When he asked Burden if they had any burglary tools such as pliers he was told that they did not. However, Deputy Thomas saw a pair of pliers in the backset of the car which contradicted that statement. These facts, taken as a whole, gave a reasonable, articulable suspicion that criminal activity was afoot. It is important to remember that "'the officer need not be absolutely certain that the individual' is engaged in an unlawful enterprise; 'the issue is whether a reasonably prudent man in the circumstances would be warranted in his belief' that the suspect is breaking, or is about to break, the law."[10]

The time and location of the stop, along with the behavior of Appellant and the presence of the pliers abundantly warranted Deputy Thomas's suspicion. His

---

[8] Id. at 417-18.
[9] Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).
[10] Williams, 147 S.W.3d at 5 (citing Terry, 392 U.S. at 27).

actions were based on a reasonable articulable suspicion and, therefore, the motion to suppress was correctly denied.

B. Motion for a Directed Verdict

Appellant's next claim is that the trial court erred by not granting his motion for a directed verdict. Appellant argues that the evidence, taken as a whole, was insufficient to support his conviction. A person is guilty of theft by unlawful taking when he unlawfully:

> (a) Takes or exercise control over movable property of another with intent to deprive him thereof; or
> (b) Obtains immovable property of another or any interest therein with intent to benefit himself or another not entitled thereto.[11]

Moreover, when the property is anhydrous ammonia and the theft is accompanied by an intent to manufacture methamphetamine, it constitutes a Class B felony for the first offense.[12] When a person agrees with another to engage in conduct constituting a crime, such as theft of anhydrous ammonia, or aids another in the planning or commission of such crime or in an attempt or solicitation to commit such crime with the intent of promoting or facilitating that crime, he is guilty of criminal conspiracy.[13]

According to Appellant, nothing in the evidence linked him to an agreement to steal anhydrous ammonia or an intent to manufacture methamphetamine, and, as a result, the trial court should have granted a directed verdict.

---

[11] KRS 514.030(1).
[12] KRS 514.030(2)(b).
[13] KRS 506.040.

The trial court is authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.[14] In Commonwealth v. Benham[15] we clarified the directed verdict rule as follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given such testimony.

"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."[16]

After hearing the evidence presented in this case, the trial judge correctly determined that it was sufficient to allow a reasonable jury to find guilt beyond a reasonable doubt. The evidence showed that Appellant and Oakley had walkie-talkies on them, and in the trunk Deputy Thomas found an air tank, a propane tank, and a garden hose with a plastic fitting taped to it. All of these are items commonly used during the theft of anhydrous ammonia. Although both Oakley and Burden testified that Appellant did not know anything about the items found in the car, their testimony conflicted as to where Appellant was located when the tanks and hose were loaded into the car. There was also testimony that Oakley stated "No, we haven't got any, yet," in reference to stealing anhydrous ammonia at the site located 1.1 miles away. This suggests an agreement among all participants. This was sufficient evidence to support

---

[14] Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).
[15] 816 S.W.2d 186 (Ky. 1991).
[16] Id. at 187.

a reasonable jury in finding Appellant guilty of conspiracy to theft of anhydrous ammonia with intent to manufacture methamphetamine.

As we have previously stated, conspiracy may be and is often proven by circumstantial evidence. Though each factual circumstance by itself may not be sufficient, when all are considered as a whole, a reasonable inference of a conspiracy arises. The ultimate conclusion is for the jury.[17] As a result, the trial court correctly denied Appellant's motion for a directed verdict.

For the foregoing reasons, the judgment of the Union Circuit Court is affirmed.

Lambert, C.J., and Cunningham, McAnulty, Minton, Noble, and Scott, JJ., concur. Schroder, J., files a separate opinion concurring in part and dissenting in part.

[17] Canada v. Commonwealth, 136 S.W.2d 1061, 1065 (Ky. 1940).

COUNSEL FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane'
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky
Room 118, Capitol Building
Frankfort, KY 40601-8204

Susan Roncarti Lenz
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204

RENDERED: FEBRUARY 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000296-MR

RICHARD ALLEN GEARY — APPELLANT

V.

ON APPEAL FROM UNION CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
NO. 04-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY JUSTICE SCHRODER

CONCURRING IN PART AND DISSENTING IN PART

Appellant raises two claims of error: that the trial court improperly denied his motion to suppress; and that the trial court erred in denying his motion for a directed verdict of acquittal. I concur with the majority in its conclusion that the trial court correctly denied Appellant's motion to suppress. However, I cannot agree that there was no error in denying the motion for a directed verdict on the conspiracy to commit theft of anhydrous ammonia.

I suspect Richard Allen Geary was preparing to steal anhydrous ammonia, and I have no doubt he was probably going to try that evening/morning. Suspicions and probabilities are not sufficient to convict someone of conspiracy. I agree that the officer exercised good judgment in investigating the situation the evening he questioned the Appellant. The tools and equipment discovered by

the officer gave the Appellant the ability to commit such a theft, and may even constitute another crime by the mere possession of such paraphernalia, but there was simply no evidence of an agreement on the requisite intent to commit a specific act of theft here. KRS 506.040(1); KRS 514.030.

The conspiracy theory selects a building 1.1 miles away from the Appellant as a target. Maybe the Appellant was heading there. Maybe Appellant was heading somewhere else. Maybe Appellant had already done his business elsewhere and was on his way home. We only have the officer's suspicions, not evidence of the intent to commit a theft. If the officer had observed the Appellant in close proximity to the intended target, or had evidence of a planned theft, I could agree with the majority. As the record in this case is devoid of such circumstantial or direct evidence, I believe the trial court should have directed a verdict of acquittal to the charged crime.