IMPORTANT NOTICE
<u>NOT TO BE PUBLISHED OPINION</u>

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: MAY 21, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2007-SC-000868-MR

DATE 6/11/09 Kelly Klaber D.C.

FREELAND RILEY APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
NO. 06-CR-00539-001

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART, AND VACATING AND REMANDING, IN PART

Appellant, Freeland Riley, was convicted by a McCracken Circuit Court jury of trafficking in marijuana, use or possession of drug paraphernalia, first-degree possession of a controlled substance, cocaine,[1] first-degree trafficking in methamphetamine, second offense, and of being a first-degree persistent felony offender. For these crimes, Appellant was sentenced to thirty days' imprisonment for each of the misdemeanor offenses, to twenty years' imprisonment for possession of a controlled substance, cocaine, and to life imprisonment for trafficking in methamphetamine. The trial court ordered the trafficking offenses to be served consecutively for a total sentence of life plus

[1] The final judgment incorrectly lists this conviction as for trafficking in cocaine. Section VI.

twenty years. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Appellant asserts six arguments on appeal: 1) that the trial court erred by denying his motion for a directed verdict on the offense of trafficking in methamphetamine and trafficking in marijuana; 2) that the trial court erred when it denied his motion for a directed verdict for the offense of possession of a controlled substance, cocaine; 3) that his right to be free from unreasonable search and seizure was violated by the police search of his house and property; 4) that the introduction of wall art found in Appellant's home which advocated drug use was error; 5) that the trial court erred by ordering that Appellant's twenty year sentence be served consecutively to his life sentence; and 6) that the trial court erred in the final judgment when it listed Appellant's conviction for possession of a controlled substance, cocaine to be trafficking in cocaine. For the reasons set forth herein, we affirm Appellant's conviction, but reverse the judgment and remand the matter to the trial court to correct its errors regarding Appellant's sentence.

This case began when Deputy Don Tidwell of the McCracken County Sheriff's Department went to Appellant's farm to serve warrants from an unrelated traffic accident. As he pulled into the driveway, Deputy Tidwell saw Appellant with a female. Deputy Tidwell noticed sores on Appellant which he associated with methamphetamine use. He immediately asked Appellant for permission to search the property. Appellant refused, and he was taken into

custody.

Appellant was taken to the McCracken County Sheriff's Department where he was interviewed by Deputy Matt Carter. Appellant admitted to Deputy Carter that he used methamphetamine a long time ago. Deputy Carter informed Appellant that he had received anonymous tips which indicated that Appellant was dealing in illegal drugs. Deputy Carter then asked Appellant for permission to search his farm. Appellant consented to a search limited to the field and woods located behind his residence.

Ricky Harris, Appellant's parole officer, was then called to interview Appellant. During the interview Harris got Appellant to admit he was recently using methamphetamine. Appellant also admitted that it was possible that drug-related items may be found on his property. After the interview, Harris called his district supervisor who instructed him to search Appellant's residence without a warrant due to safety concerns for fear that a methamphetamine lab may be located there.

Deputy Carter and Harris then performed a search of Appellant's property. The search turned up numerous drug-related items. Inside Appellant's residence they found a broken methamphetamine pipe, two metal crack pipes containing cocaine residue, a marijuana joint containing .02 grams of marijuana, and a piece of aluminum foil which was believed to have been used to heat methamphetamine. A search outside of the residence produced more drug paraphernalia. A blue bag found in a chicken coop contained two

crack pipes containing cocaine residue, digital scales capable of weighing five pounds, and several plastic bags. A mailing envelope found next to a shed contained used syringes. A plastic container and green army bag were found in a shed and contained tubing, hoses, a spoon, jars, epoxy, a pitcher, plastic bags, duct tape, and thick rubber gloves. In a trash pile the officers found a blue bank bag which contained butane fuel, butane lighters, straws, two glass pipes containing methamphetamine residue, a marijuana blunt, plastic baggies, and fifty-three dollars. On a burn pile they found two suspected ether bottles, a butane bottle, and three pieces of suspected broken methamphetamine pipes. Finally, in a corn hopper two gym bags were found containing green leafy residue and a type of laundry detergent or soap. Appellant later admitted to police that he used one of those bags to store marijuana.

After the search, Appellant was again interviewed by the sheriff. He admitted ownership to all of the drug items except for the methamphetamine manufacturing equipment. He also admitted to selling marijuana and methamphetamine. Based in large part on the confessions, Appellant was indicted by the McCracken County Grand Jury and ultimately found guilty of the above listed crimes.

I. The trial court properly denied Appellant's motion for a directed verdict for the offenses of trafficking in methamphetamine and trafficking in marijuana

Appellant first argues that the trial court improperly denied his motion for a directed verdict of acquittal on the offenses of trafficking in methamphetamine and trafficking in marijuana. Appellant argues that the Commonwealth failed to prove the corpus delicti of these crimes because he believes the only evidence of drug trafficking was his confession made to the Sheriff's Department. Appellant argues that the confession violated RCr 9.60 because there was insufficient evidence to corroborate it. Appellant also points out that the jury instructions on these charges were predicated on him having "possession [of methamphetamine and marijuana] with intent to sell" but that a search of his property turned up only trace amounts of these drugs. We will treat this allegation of error as preserved since Appellant did specifically move for a directed verdict based on insufficiency of the evidence.

A trial court's decision regarding a directed verdict motion is reviewed under the standard articulated in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991):

> 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 to 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, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187. When a defendant's out-of-court confession is used as evidence it must satisfy the standard provided in RCr 9.60. RCr 9.60 states that "[a] confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed."

> [T]he proof required by RCr 9.60 to corroborate an extrajudicial confession need not be such that, independent of the confession, would establish the corpus delicti or Appellant's guilt beyond a reasonable doubt; and that proof of the corpus delicti, *i.e.*, that the offense of DUI was actually committed, may be established by considering the confession as well as the corroborating evidence. Thus, even if the circumstantial evidence in this case standing alone would not suffice to prove guilt beyond a reasonable doubt, it sufficed to corroborate Appellant's confession; and the circumstantial evidence and the confession considered together constituted sufficient proof to take the case to the jury.

Blades v. Commonwealth, 957 S.W.2d 246, 250 (Ky. 1997)(internal citations omitted).

In this matter, to find Appellant guilty of trafficking in methamphetamine the evidence had to show that before the indictment he had in his possession a quantity of methamphetamine, he knew he possessed methamphetamine, and he intended to sell the methamphetamine to another person. KRS 218A.1412. To find Appellant guilty of trafficking in marijuana the evidence had to show that he had in his possession before the indictment a quantity of marijuana, he knew he possessed marijuana, and that he intended to sell the marijuana to another person. KRS 218A.1421. In reviewing the evidence presented, including Appellant's confession, the trial court properly denied Appellant's

motions for a directed verdict of acquittal for trafficking in methamphetamine and trafficking in marijuana. While large quantities of illegal narcotics were not found on Appellant's property, the abundance of drug paraphernalia found hidden in various areas during the search presents enough circumstantial evidence to support Appellant's confession. See Blades, 957 S.W.2d at 250. Additionally, the search turned up traces of methamphetamine and marijuana which indicates that Appellant previously possessed these drugs. See generally Commonwealth v. Shivley, 814 S.W.2d 572 (Ky. 1991).

Appellant asks us to overrule Blades to the extent that it allows us to consider his confession in determining whether the corpus delicti of a crime has been established. Appellant believes that there must be evidence, separate from his confession, which conclusively proves the occurrence of a crime. We decline to overrule Blades or interpret it in this manner. We believe that RCr 9.60 does not require that the evidence corroborating a confession must alone show that a crime occurred. RCr 9.60 only requires that the confession be "accompanied by other proof that such an offense was committed." We believe that Blades accurately describes this requirement and that circumstantial evidence can be used to satisfy the corroboration requirement of RCr 9.60. The trial court properly denied Appellant's directed verdict motions.

II. The trial court properly denied Appellant's motion for a directed verdict for the offense of possession of a controlled substance

Appellant next argues that the trial court improperly denied his motion

for a directed verdict on the offense of possession of a controlled substance, cocaine. Appellant argues that since only cocaine residue was found in some of the crack pipes found on his property, he did not actually possess enough cocaine to be found guilty of possession of a controlled substance. Appellant asks us to overrule Commonwealth v. Shivley, 814 S.W.2d 572 (Ky. 1991), and its progeny to the extent that they hold that finding drug residue is sufficient for a possession conviction. In the alternative, Appellant argues that there is insufficient evidence to prove that he actually possessed any of the crack pipes which contained the cocaine residue. Again we will review the trial court's ruling to see "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." Benham, 816 S.W.2d at 187.

KRS 218A.1415 states:

> A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains any quantity of [a substance] that is classified in Schedules I or II which is a narcotic drug.

Cocaine is classified as a Schedule II controlled substance. KRS 218A.070(1)(d). We have repeatedly held that the "any quantity" language in KRS 218A.1415 is satisfied by possession of the residue of an illegal narcotic. See Hampton v. Commonwealth, 231 S.W.3d 740, 750 (Ky. 2007); Bolen v. Commonwealth, 31 S.W.3d 907, 909 (Ky. 2000). There is no need for the defendant to have a measurable quantity of the illegal narcotic. Id.

In this matter, there was adequate evidence for a reasonable juror to find

Appellant guilty of possession of a controlled substance. We stand by our prior decision in Shivley and its progeny, and hold that to be convicted of a violation of KRS 218A.1415 one must only have possession of residue of a narcotic drug.[2] While the crack pipes containing the cocaine residue were not found in the direct possession of Appellant, we believe a jury could reasonably infer that he had constructive possession of the narcotic residue. See Clay v. Commonwealth, 867 S.W.2d 200, 202 (Ky. App. 1993) (holding that proof defendant had constructive possession of narcotics found in her house was adequate for a possession conviction). The evidence clearly indicated that the crack pipes were found in Appellant's residence in areas which he used. Id. We believe that the constructive possession along with his confessions to having possessed drugs provides enough evidence for a juror to find him guilty. Thus, the trial court correctly denied Appellant's motion for a directed verdict for the offense of possession of a controlled substance.

III. The warrantless searches of Appellant's property were lawful

Appellant next argues that the warrantless search of his property violated his Fourth Amendment right to be free from unreasonable searches and seizures. Prior to trial, Appellant moved to suppress all evidence found during the search of his property. The trial court denied the motion finding that Harris, Appellant's parole officer, could perform a warrantless search per

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[2] Appellant's argument against the Shivley holding could have some appeal in a factual context casting reasonable doubt on the intent or knowledge of the accused possessor of an item bearing merely the a residue of a controlled substance, such as dollar bill or other innocent item bearing a trace of an illegal drug. But the residue-bearing items involved here create no such doubt.

Griffin v. Wisconsin, 483 U.S. 868 (1987), and that Appellant consented to a warrantless search of the outbuildings and wooded area behind his residence. Appellant now argues that the evidence from the warrantless search should be suppressed because Harris did not satisfy the requirements to perform a warrantless search and Appellant's consent to a search was invalid. We disagree.

"[A] warrantless search of a probationer's residence is reasonable under the Fourth Amendment when the search is supported by a reasonable suspicion that the probationer is engaged in criminal activity and such a search is authorized by a condition of probation." Riley v. Commonwealth, 120 S.W.3d 622, 627 (Ky. 2003) (citing United States v. Knights, 534 U.S. 112, 122 (2001)). The Commonwealth has the authority to issue regulations regarding when a warrantless search may be performed on a parolee's property. Riley, 120 S.W.3d at 627; See also 501 KAR 6:270. Kentucky Probation and Parole Policy Procedure (PPP) 27-16-01, §II-A states:

> An offender shall be subject to a personal search of his residence, or any other property under his control. The basis for any search shall be substantiated by reasonable suspicion that the performance of the search may produce evidence to support the alleged violation.

PPP 27-16-01 §II-D provides for a search without consent of the parolee if an officer has "reasonable suspicion to believe that an offender is in possession of contraband or in violation of the conditions of his supervision." Additionally, a warrantless search may occur if "exigent or emergency circumstances" exist.

PPP 27-16-01 §II-D(2). These circumstances include "if delay may endanger the life of the officer or the lives of others." Id.

In this matter, Appellant was a parolee and agreed to live under the PPP regulations. Appellant signed paperwork to that effect. There was more than adequate evidence presented to the police and Appellant's parole officer that he was engaging in conduct which violated the terms of his probation. In particular, the potential existence of "meth sores" on Appellant's body, Deputy Carter's tip that Appellant was engaging in the sale of illegal narcotics, and Appellant's own admission that he used illegal drugs all provided adequate proof Appellant was violating his parole. Thus, PPP 27-16-01, §II-D applied to this situation, and the warrantless search was proper. Further, the evidence supported Harris's direct supervisor's fear that Appellant may have had a methamphetamine lab on his property and that certainly justified a search under "exigent or emergency circumstances." Had the potential methamphetamine lab exploded it could have caused injury to police or the public. Thus, a warrantless search was further justified under PPP 27-16-01 §II-D(2).

Additionally, the record indicates that Appellant gave his consent for a search of at least certain parts of his property. The trial court found that Appellant waived his Miranda rights and gave knowing consent to the search. We cannot find anything in the record to refute the trial court's finding. See Olden v. Commonwealth, 203 S.W.3d 672, 676 (Ky. 2006) (holding that the

factual findings of the trial court are conclusive if supported by substantial evidence); RCr 9.78.

Appellant finally argues that the search should not have included the outbuildings on his property. Appellant argues that the outbuildings were not included in what Appellant consented to and that they constituted curtilage around his house. However, we believe that PPP 27-16-01, §II-D covers these outbuildings and thus the search of the outbuildings was appropriate. The trial court properly denied Appellant's motion to suppress.

IV. Introduction of the wall art into evidence, if error, was harmless

Appellant next argues that the trial court impermissibly allowed the Commonwealth to introduce into evidence a picture of wall art which advertised marijuana. Appellant objected to the introduction of this evidence during trial and also made a pretrial motion to exclude any KRE 404(b) evidence. The photograph depicting the wall art was introduced during Harris's testimony. The wall art is a burlap sack which on the top says "Rebel Brand." Under that is a Confederate flag with a marijuana leaf in the center of it. In the center of the marijuana leaf is a skull wearing a Confederate flag cap smoking a marijuana cigarette. Underneath the flag and leaf is the word "Marijuana." Below that are the words "50 Hybrid Kilos" and "Deep South Weed Co." On the bottom of the bag is a list of cities in the Southern United States.

Appellant argues that the introduction of the wall art photograph was

propensity evidence which is inadmissible under our ruling in Dyer v. Commonwealth, 816 S.W.2d 647 (Ky. 1991) (overruled on other grounds by Baker v. Commonwealth, 973 S.W.2d 54 (Ky. 1998)). In Dyer we wrote, "that citizens and residents of Kentucky are not subject to criminal conviction based upon the contents of their bookcase unless and until there is evidence linking it to the crime charged." Id. at 652. Appellant argues that the wall art had no connection to the crimes he was charged with. He argues that his display of the wall art is protected by the First Amendment and only advocates the legalization of narcotics. The Commonwealth argues that the wall art showed Appellant's knowledge of drugs and his intent to sell them. The Commonwealth believes that the wall art is not covered by KRE 404(b) because possession of the wall art is not a crime, wrong, or an act.

In this matter, the introduction of the wall art photograph, if error was harmless. Appellant's ownership of the wall art does not fall under KRE 404(b) since owning it does not constitute a crime or a wrong. We agree with Appellant that his ownership of the wall art is protected by the First Amendment, but that does not preclude its use as evidence. The presence of the wall art in his house helps support his confession that he possessed and sold drugs by indicating that he had knowledge of drug usage, and in light of his confession, introducing his display of marijuana-related wall art, if error at all, is harmless.

V. The trial court erred when he ordered Appellant's twenty-year

sentence to be served consecutive to his life sentence

Appellant next argues that the trial court erred when it ordered his twenty-year sentence for trafficking in cocaine to be served consecutively with his life sentence for trafficking in methamphetamine. See Stewart v. Commonwealth, 153 S.W.3d 789, 792 (Ky. 2005) ("[I]t is improper to order a term of years sentence to run consecutively with a life sentence.") The Commonwealth concedes this error. We therefore remand this matter to the trial court to correct Appellant's final sentencing so that the twenty-year sentence runs concurrently with his life sentence.

VI. The trial court erred when it denominated Appellant's conviction for possession of cocaine to trafficking in cocaine

Finally, Appellant argues that the trial court erred by including in its written sentencing order that Appellant was convicted of trafficking in cocaine instead of possession of cocaine. The trial record clearly indicates that the jury convicted Appellant of first-degree possession of a controlled substance, cocaine, and not for trafficking in cocaine. The Commonwealth concedes this error. We thus, order the trial court to correct its clerical error in the sentencing order by indicating that Appellant was convicted of first-degree possession of a controlled substance, cocaine and not first-degree trafficking in cocaine.

Thus, for the above reasons, we affirm the judgment of the McCracken Circuit Court, but vacate the final judgment and remand the matter to the trial

court to correct its sentencing errors.

All sitting. All concur.

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