

**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**NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

# Supreme Court of Kentucky

2011-SC-000003-MR

THOMAS MCPHERSON

APPELLANT

V.

ON APPEAL FROM UNION CIRCUIT COURT  
HONORABLE C. RENE WILLIAMS, JUDGE  
NO. 10-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Thomas McPherson, entered a conditional guilty plea in the Union Circuit Court to the charges of manufacturing methamphetamine, second offense; possession of a controlled substance, first degree, second offense; and unlawful possession of methamphetamine precursor. For these crimes, Appellant received a total sentence of twenty years' imprisonment. As a condition to his guilty plea, Appellant reserved the right to appeal from the circuit court's order denying his motion to suppress. Appellant now appeals as a matter of right. Ky. Const. § 110.

The sole issue reserved by Appellant is whether the police officer that searched Appellant's car and seized the evidence found therein had probable cause. For the reasons set forth below, we affirm Appellant's conviction.

Following indictment for the offenses stated above, Appellant moved the trial court to suppress evidence seized by police during a warrantless search of his automobile. The trial court conducted an evidentiary hearing and made written findings of fact, concluded that the officer conducting the search had probable cause to do so, and denied the motion to suppress.

When an appellate court reviews an order on a motion to suppress evidence, RCr 9.78 mandates that the trial court's findings of fact are conclusive so long as they are supported by substantial evidence. The appellate court then reviews *de novo* the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. *Owens v. Commonwealth*, 291 S.W.3d 704, 707 (Ky. 2009).

#### FACTS AND BACKGROUND INFORMATION

The following facts are taken from the trial court's order denying Appellant's motion to suppress and the parties' briefs. Kentucky State Police officers, looking for evidence relating to manufacturing methamphetamine, executed a search warrant at a residence owned by Shawn Powell. They found several components of a laboratory for making methamphetamine, including dangerous chemicals, but they did not find the large quantity of methamphetamine they suspected was there. They also failed to find Shawn Powell. While the search was under way, Appellant arrived upon the scene in his vehicle. A state police trooper informed Appellant of the search, and advised him to leave. He complied.

A few hours later, at approximately 2:00 a.m., Union County Deputy Sheriff Jason Thomas saw a car drive onto Powell's property, circle the driveway, and leave. Thomas followed the vehicle, and when it pulled over to the side of the road, he pulled in behind it.

Thomas approached the driver of the vehicle and asked him several questions. At that point, Thomas learned that the driver was Appellant, the same person who had driven onto the property during the search and had been warned to leave. Appellant told Thomas that he was on the Powell property to find the truck wheels that had been left for him there.<sup>1</sup> Appellant also admitted in response to Thomas's inquiry that he had previously been convicted for manufacturing methamphetamine.

Thomas then asked Appellant if he could search the vehicle. Although Thomas testified that Appellant consented to a search, Appellant denied giving consent. The trial court did not resolve that factual dispute, and accordingly, there is no claim before this Court that the search was justified by consent. Thomas proceeded to search the vehicle and found several items relevant to the charges upon which Appellant's conditional guilty plea entered.

Our review of the record persuades us that the foregoing findings of fact are supported by substantial evidence.

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<sup>1</sup> Thomas acknowledged that he had seen a set of truck wheels lying on Powell's property, but also stated that they were readily visible to anyone who drove onto the property. Appellant never retrieved the truck wheels.

## APPLICATION OF THE FACTS TO THE LAW

Having determined that the operative facts are supported by substantial evidence, we now review *de novo* the application of the law to the facts. The test for probable cause is whether, based upon the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Moore v. Commonwealth*, 159 S.W.3d 325, 329 (Ky. 2005); *Sampson v. Commonwealth*, 609 S.W.2d 355, 358-359 (Ky. 1980); *see also Morton v. Commonwealth*, 232 S.W.3d 566, 569 (Ky. App. 2007)( holding that the automobile exception to the warrant requirement permits an officer to search a legitimately stopped vehicle where probable cause exists that contraband or evidence of a crime may be in the vehicle).

The trial court concluded that the officer's knowledge of the following facts established a fair probability that he would find contraband or other evidence of a crime in Appellant's vehicle:

1. The police found the makings of a meth lab on Powell's property but did not find Powell or the "large quantity of methamphetamine" they thought would be there;
2. Appellant entered the Powell property, and was warned by police of the meth lab, and warned that he should leave;
3. A few hours later, at 2:00 a.m., Appellant returned to the Powell property;
4. Appellant was acquainted with Powell;
5. Appellant was previously convicted for manufacturing methamphetamine.

Although our *de novo* review affords no deference to the trial court's application of the law to the established facts, *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998), upon consideration of the totality of the circumstances we

agree with the trial court's conclusion. Appellant's persistence, despite police warnings, to be on Powell's property known for its meth connection, the unusual hour of the morning when he drove onto the property, Appellant's acquaintance with Powell, and Appellant's own past association with the manufacturing of methamphetamine would lead a reasonable person with ordinary common sense to believe with fair probability that Appellant was involved with the illegal activity on Powell's property and that evidence of that involvement could be found in his car. We therefore conclude that there existed probable cause to conduct a search of Appellant's vehicle.

#### CONCLUSION

For the reasons set forth above, we affirm the order of the Union Circuit Court denying Appellant's motion to suppress evidence.

All sitting. All concur.

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