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Supreme Court of Kentucky

2013-SC-000476-MR

DENZIL BURTON

APPELLANT

V. ON APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET CROCKER, JUDGE
NO. 12-CR-00044

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Denzil Burton (Burton) appeals from the Allen Circuit Court judgment convicting him of manufacturing methamphetamine and of being a persistent felony offender in the first degree (PFO I) and sentencing him to thirty-five years' imprisonment. On appeal, Burton argues that the trial court erred when: (1) it denied his motion for a directed verdict on the manufacturing methamphetamine charge; (2) it unduly prejudiced him by permitting the jury to view video of him in handcuffs and an orange jumpsuit; (3) it denied his motion for a mistrial; and (4) it denied his motion to suppress evidence. Having reviewed the record and the arguments of the parties, we affirm.

I. FACTS.

On February 2, 2011, Detective Brad Emery (Detective Emery) and two other officers of the Scottsville Police Department went to Burton's home to execute a search warrant. Detective Emery obtained the warrant based on

information that Burton had been involved in a recent burglary. When the officers arrived at the house, Detective Emery observed two men, Michael Whitney (Michael) and David Dismond (Dismond), sitting in a Pontiac GrandAm in front of Burton's house. Detective Emery told the two to remain in the car while he executed the search warrant. Detective Emery then went to the front door of the house, while one officer went to the rear of the house. When Detective Emery entered the front door, Burton exited through a back door, where he was apprehended.

While the other officers searched the house, Detective Emery went outside to speak with the occupants of the GrandAm. After receiving permission from Dismond, Detective Emery searched the GrandAm and found digital scales and what appeared to be ammonium nitrate in the passenger compartment. He also found a camouflage duffle bag in the trunk, which contained clothing and a smaller red bag.¹ Detective Emery opened the red bag and found liquid fire, coffee filters, plastic tubing, and a funnel. Because Detective Emery believed these items could be evidence of the manufacturing of methamphetamine, he called Drug Task Force Detective Mike Wimpee (Detective Wimpee). Detective Wimpee told Detective Emery to impound and hold the GrandAm until he could get a search warrant for the vehicle and its contents. The next day, after having obtained the search warrant, Detective Wimpee searched the GrandAm. In addition to what Detective Emery found,

¹ The bag is variously referred to as being red and white or red and black. There is no dispute about which bag was involved. For the sake of clarity, we refer to it as the red bag.

Detective Wimpee found a measuring cup, a sea salt shaker with a built-in grinder, and a container of what appeared to be sea salt in the red bag.

Detective Wimpee testified that it is legal to own each of the individual items found in the GrandAm; however, the only reason to have those items together would be to manufacture methamphetamine.

Based on this evidence, a jury convicted and sentenced Burton as set forth above. We set forth additional facts as necessary in our analysis of the issues raised by Burton on appeal.

II. STANDARD OF REVIEW.

The standards of review for the issues raised by Burton vary; therefore, we set them forth as we analyze each issue.

III. ANALYSIS.

A. Failure to Grant Directed Verdict.

Burton moved for a directed verdict both at the end of the Commonwealth's case and at the end of his case. In his motions, Burton argued, as he does here, that the Commonwealth did not meet its burden of proving that he possessed equipment and/or chemicals with the intent to manufacture methamphetamine. According to Burton, the Commonwealth failed to meet its burden of proving intent because it only produced evidence that he had items that he was legally entitled to have - sea salt, rubber tubing, coffee filters, digital scales, a funnel, and liquid fire. He notes that the Commonwealth did not produce evidence that he possessed an essential precursor to manufacturing methamphetamine - pseudoephedrine - or that he

possessed any pseudoephedrine packaging. Furthermore, Burton notes that the Commonwealth failed to produce evidence that he possessed methamphetamine or that any of the seized items contained methamphetamine residue. Finally, Burton argues that the Commonwealth did not produce any testimony to verify that the substance found in the GrandAm was ammonium nitrate. We note that Burton did not object to testimony from Detective Emery and Detective Wimpee that the substance appeared to be ammonium nitrate. Furthermore, Burton did not offer any proof to the contrary.

The Commonwealth agrees that, when viewed separately and in isolation, a person may lawfully possess the items found in the GrandAm. However, as noted by the Commonwealth, Detective Wimpee "testified that the only use for all of these items together was to manufacture methamphetamine."

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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Kentucky Revised Statute (KRS) 218A.1432 provides that: "(1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully: (a) Manufactures methamphetamine; or (b) With intent to

manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine." KRS 218A.010(18) states that:

"Intent to manufacture" means any evidence which demonstrates a person's conscious objective to manufacture a controlled substance or methamphetamine. Such evidence includes but is not limited to statements and a chemical substance's usage, quantity, manner of storage, or proximity to other chemical substances or equipment used to manufacture a controlled substance or methamphetamine.

Here, the Commonwealth produced evidence that Burton possessed chemical substances - liquid fire and ammonium nitrate - and equipment - rubber tubing, coffee filters, and a funnel - stored in proximity to each other and in proximity to digital scales. This evidence, taken in the light most favorable to the Commonwealth, was sufficient under the statutory definition of manufacturing methamphetamine to submit the charge to a jury. Therefore, we discern no error in the trial court's denial of Burton's motions for directed verdict.

B. Undue Prejudice.

Prior to trial, the Commonwealth filed a motion *in limine* stating that it intended to play a portion of a statement Burton had made during a pre-trial conference. During that conference, Burton appeared before the court in handcuffs and wearing his prison-issued orange jumpsuit. At the end of that conference, Burton asked to address the court. After being admonished that anything he said could be used against him, Burton stated, in pertinent part, that the duffle bag and its contents were his. Burton objected to having this

video played to the jury because his appearance in court, attired as an inmate, would be unduly prejudicial. He pointed out, and the court agreed, that the Commonwealth could play the audio of the statement or read from a transcript of the statement. However, the Commonwealth argued that those two options would not be as powerful as playing the video. After hearing the arguments from counsel, the court permitted the Commonwealth to play the segment to the jury. However, before doing so, the court admonished the jury that Burton's appearance as an inmate and the fact that he was in custody were not evidence of guilt in the case being tried or in any other case.

Burton continues to argue that he was unduly prejudiced by the playing of the video. In support of his argument, Burton cites to Kentucky Rule of Criminal Procedure (RCr) 8.28(5) which states that, "[e]xcept for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint." He also cites to *Peterson v. Commonwealth*, 160 S.W.3d 730, 733 (Ky. 2005), which states that a criminal defendant should only be restrained during trial in extraordinary circumstances. The Commonwealth argues that the evidence was relevant, a fact that Burton has never disputed, and that the court did not abuse its discretion by admitting it.

"The standard of review for a trial court's evidentiary rulings is abuse of discretion. The test for abuse of discretion is 'whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal

principles." *McDaniel v. Commonwealth*, 415 S.W.3d 643, 655 (Ky. 2013) (internal citations omitted).

We are troubled by the court's finding that the video segment showing Burton handcuffed and dressed in inmate apparel was admissible. In particular, we note that the Commonwealth's argument that the video was the most powerful way to present the evidence to the jury was weak, at best, and was not a sufficient reason for the court to admit the video. However, the court's admonition to the jury, which is presumed to be effective, was sufficient to cure any defect. *See Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999). As we noted in *Johnson v. Commonwealth*:

There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was 'inflammatory' or 'highly prejudicial.'"

105 S.W.3d 430, 441 (Ky. 2003) (emphasis in original).

Burton has not shown that either of the preceding factors was present; therefore, the court cured any abuse of discretion with its admonition. Detective Emery and the Allen County Jailer testified that Burton admitted the seized items were his. Thus, in light of this overwhelming evidence of Burton's guilt, any error in the court's admission of the video was harmless.

C. Failure to Grant Mistrial.

Burton made a motion *in limine* seeking to prevent any of the Commonwealth's witnesses from testifying during trial that Burton fled the house. The court granted the motion.

Initially, we note that "evidence of flight is admissible because it has a tendency to make the existence of the defendant's guilt more probable" *Rodriguez v. Commonwealth*, 107 S.W.3d 215, 219 (Ky. 2003); *Doneghy v. Commonwealth*, 410 S.W.3d 95, 105 (Ky. 2013), reh'g denied (Oct. 24, 2013). Therefore, we agree with the Commonwealth that the trial court should not have excluded this evidence. However, the Commonwealth has not appealed from the court's order excluding evidence of Burton's flight, and we do not further address the propriety of that order. What is before us is whether, erroneous or not, the Commonwealth violated the trial court's order and, if so, whether the court should have granted Burton's motion for a mistrial. We address that issue below.

On direct examination, the Commonwealth asked Detective Emery where Burton was when Detective Emery was searching the car. Despite being present when the court ruled that evidence of Burton's flight was not admissible, Detective Emery testified that Burton attempted to leave the scene through the basement at the back of the house. Burton immediately moved for a mistrial. The court denied the motion but did reiterate to Detective Emery that he was not to discuss any attempt by Burton to flee or leave the scene.

Furthermore, the court told the jury that Detective Emery's testimony was not competent and admonished the jury to ignore it.

"The decision to grant a mistrial is within the sound discretion of the trial court and such a ruling will not be disturbed absent an abuse of discretion." *Shemwell v. Commonwealth*, 294 S.W.3d 430, 437 (Ky. 2009). Burton argues that the trial court abused its discretion because Detective Emery knowingly violated the court's order excluding evidence of Burton's flight. The Commonwealth argues that Detective Emery did not violate the court's order because he "did not mention the word flight in any form."

As noted above, an admonition is deemed to be effective except in rare instances. This is not one of those instances. Burton has not shown that either of the above cited *Johnson* factors applies. Burton made multiple admissions that the seized items were his; therefore, Detective Emery's statement that Burton was leaving the house through the basement door cannot be characterized as devastating to Burton's defense. Furthermore, even though Detective Emery's response was improper under the court's erroneous ruling, the Commonwealth's question was neither inflammatory nor highly prejudicial. Therefore, we hold that the trial court's admonition was sufficient and the trial court did not abuse its discretion in denying Burton's motion for a mistrial.

D. Failure to Suppress.

Burton filed a motion to suppress the evidence seized from the GrandAm. At the suppression hearing, Detective Emery testified that, when he arrived at

Burton's house, Dismond was sitting in the front passenger seat of the GrandAm, which belonged to his girlfriend, and Micheal was sitting in the back driver's side seat. Burton and Michael's brother, Larry Whitney, Jr. (Larry), were in the house. The car was running and, when asked, Dismond and Michael said that they were waiting for Larry and Burton.

Detective Emery testified that, because there was an outstanding arrest warrant for Michael, he asked Michael to get out of the car and placed him under arrest. At some point during his encounter with Michael and Dismond, Detective Emery saw a set of digital scales in the car, which Michael said belonged to Larry. Because Detective Emery knew that digital scales are used in the drug trade and that Michael, Dismond, Larry, and Burton had a history of drug related charges, he then asked Dismond to get out of the car and for permission to search it. Dismond gave his permission and he and Michael volunteered that anything Detective Emery might find in the car was not theirs but belonged to either Larry or Burton.² When he searched the car, Detective

² We note that Detective Emery's testimony was somewhat confusing. He initially testified that the car had two doors, then agreed that it could have had four doors. He initially testified that he saw the digital scales as Michael was getting out of the car, then stated that he found the scales after Dismond gave permission to search. He initially testified that he asked Dismond for permission to search after seeing the scales, then stated that he asked for permission to search before he saw the scales. Regardless of these inconsistencies, there is no dispute that Dismond gave Detective Emery permission to search the car and that Detective Emery found digital scales and ammonium nitrate in the passenger compartment of the car.

Emery found the items previously described herein, and he arrested all four men and charged them with manufacturing methamphetamine.³

According to Detective Emery, Burton initially denied but later admitted that the contents of the duffle bag were his and that they did not belong to Larry, Michael, or Dismond.

Based on the preceding evidence, the court denied Burton's motion to suppress the evidence seized from the trunk of the car. In doing so, the court found that: (1) Detective Emery had a reasonable belief that Dismond had authority to permit a search of the car; (2) once Detective Emery discovered the ammonium nitrate in the console of the passenger compartment, he had probable cause to search the entire vehicle, including any containers; (3) the car remained readily mobile prior to the search; and (4) Burton had abandoned any expectation of privacy he had in the contents of the car. On appeal, Burton concedes that Dismond had the authority to permit Detective Emery to search the car; however, he argues that none of the exceptions cited by the trial court validate Detective Emery's warrantless search of Burton's duffle bag. The Commonwealth argues, in pertinent part, that Detective Emery's search falls within the automobile exception to the warrant requirement. We agree with the Commonwealth; therefore, we do not address the parties' arguments regarding the other exceptions.

³ We note that Burton argued that Detective Emery initially charged him with burglary and later added the manufacturing methamphetamine charge. However, the timing of those charges is not at issue.

Our standard of review on a motion to suppress is two-fold. The trial court's factual findings are reviewed for clear error and are deemed conclusive if supported by substantial evidence. *Chavies v. Commonwealth*, 354 S.W.3d 103, 108-09 (Ky. 2011); RCr 9.78. However, we review the trial court's application of the law to the facts *de novo*. *Chavies*, 354 S.W.3d at 109.

As a general rule, warrantless searches are, *per se*, unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Helphenstine v. Commonwealth*, 423 S.W.3d 708, 714 (Ky. 2014) *citing* *Katz v. United States*, 389 U.S. 347 (1967). One exception involves the search of automobiles, and it "applies when there is probable cause to believe an automobile contains evidence of criminal activity and the automobile is readily mobile." *Chavies v. Commonwealth*, 354 S.W.3d 103, 110 (Ky. 2011). The Commonwealth bears the burden of proving entitlement to the exception. *See Posey v. Commonwealth*, 185 S.W.3d 170, 173 (Ky. 2006).

1. Ready Mobility.

In *Chavies*, we held that an automobile, by its very nature, is readily mobile. Thus, for purposes of the automobile exception, the search of an automobile is lawful not because an automobile probably will be used on the highways, but because it can be. 354 S.W.3d at 111. Furthermore, whether the occupants have been removed from the vehicle and taken into custody does not negate an automobile's ready mobility. *Id.*

In this case, Michael was in custody before Detective Emery searched the car. However, Dismond was not, and he had the keys to the car in his

possession during Detective Emery's search. Therefore, the trial court's finding that the car was readily mobile is supported by the evidence and was not clearly erroneous.

2. Probable Cause.

“[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules.” See *Rodgers v. Commonwealth*, 285 S.W.3d 740, 754 (Ky. 2009), citing *Illinois v. Gates*, 462 U.S. 213, 232 (1983). In assessing whether probable cause existed, a judge must consider the totality of circumstances. *Id.*

The trial court found that Dismond had the authority to give Detective Emery permission to search the car. Burton does not dispute this finding. During his authorized search of the passenger compartment, Detective Emery found ammonium nitrate. The ammonium nitrate, in conjunction with the digital scales and his knowledge that Michael, Larry, Dismond, and Burton had a history of drug charges, gave Detective Emery probable cause to believe the car contained other evidence of drug-related criminal activity. When "probable cause justifies the search of a . . . vehicle, it also justifies the search of every part of the vehicle and its compartments and contents that may conceal the object of the search." *Estep v. Commonwealth*, 663 S.W.2d 213, 215 (Ky. 1983). Because Burton's duffle bag was in the car and it could have concealed evidence of drug-related criminal activity, the trial court's finding that Detective Emery had probable cause to search the duffle bag was not clearly erroneous.

As set forth above, the car was readily mobile and Detective Emery had probable cause to believe the car contained evidence of criminal activity. The trial court properly applied the facts to the law in denying Burton's motion to suppress. Therefore, we affirm the trial court.

IV. CONCLUSION.

For the foregoing reasons, we affirm the Allen Circuit Court's judgment.

All sitting. All concur.

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