RENDERED: JULY 29, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

MODIFIED: JANUARY 27, 2006; 2:00 P.M.

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002033-MR
AND
NO. 2004-CA-000336-MR

ANTHONY WAYNE SWIFT — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
INDICTMENT NO. 02-CR-00161

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: BARBER AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: Anthony Wayne Swift was convicted by a jury of cultivating marijuana, trafficking in marijuana, and possession of drug paraphernalia. He was ordered to serve a

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

total sentence of ten years by Ohio Circuit Court. In a separate order, the court also directed that Swift's real property be forfeited. The appeals from these two orders have been consolidated on Swift's motion.

Swift argues that the trial court erred when it denied his pretrial motion to suppress evidence, his motion to continue the trial, and in refusing to give a jury instruction on the lesser-included offense of possession to the cultivation of marijuana charge. He challenges the forfeiture order on the ground that certain tracts of his property were not implicated in his drug convictions.

This case began when two deputies from the Ohio County sheriff's department arrived at Swift's house to investigate a domestic dispute. They found Swift's wife and several other people in the front yard, having a heated argument. One of the deputies, Norman Payton, spoke to Mrs. Swift about the situation. In the course of the conversation, Mrs. Swift told Payton that she needed to go inside the house to use the restroom. Payton went with her into the house, where he spotted the butt of a marijuana cigarette, or "roach," in an ashtray on a table in the hall. Payton used the presence of the "roach" as the basis for obtaining a search warrant. The warrant authorized members of the sheriff's department to search Swift's

residence, the travel trailer in the yard, and any vehicle or person on the premises.

Payton testified that when he returned to the house with the warrant, Swift was in the backyard, dumping marijuana plants. The sheriff's deputies found six bags of marijuana, some smoking pipes and some unidentified pills in the house. They found over thirty marijuana plants and 172 potted marijuana seeds in the backyard, and almost two pounds of marijuana in the camper parked in the backyard. They also found methamphetamine, scales and other drug paraphernalia in the camper.

Before trial, Swift filed an unsuccessful motion to suppress the evidence found in the search. At his trial, Swift admitted that he was a longtime user of marijuana, and that the marijuana found in the house was his own personal "smoke bag." He further claimed, however, that he always purchased his marijuana elsewhere and that the marijuana plants in the yard had been placed there by his stepson, Daniel Sizemore. Swift also denied having any knowledge of the contents of the camper which he said was being used as a residence by Sizemore, who had the only key.

A jury found Swift guilty of cultivating marijuana over five plants, trafficking in marijuana more than eight ounces and possession of drug paraphernalia, first offense. He received the maximum sentence of five years for each of the two

felony counts to be served consecutively, and twelve months for the misdemeanor charge to run concurrently.

Swift's first argument on appeal is that the presence of the "roach" in the hall of the house did not provide probable cause to justify a search of the entire house, the yard, and particularly the camper, where the largest quantity of marijuana was found. He argues that the search warrant was overly broad and lacking in specificity, thereby allowing the police to intrude on the property of strangers – namely, the camper, which he insists was inhabited solely by his stepson.

The affidavit used to obtain the warrant is set forth below:

> The affiant, Norman Payton, Ohio County Sheriff's Deputy, being first duly sworn, states that he has and there is reasonable and probable grounds to believe and affiant does believe that there is now on the premises known and numbered as 8491 Highway 62 East, Rosine Kentucky, being the residence of Anthony and Loraine Swift, including any and all outbuildings.
>
> and more particularly described as follows: **8491 Highway 62 East, Rosine, Ky. being a tan colored house with a travel trailer in the yard.**
>
> and/or in a vehicle or vehicles described as: **Any vehicle belonging to Anthony and Loraine Swift located at the above address**.
>
> and/or on the person or persons of: any and all persons located on the premises at the time of the search

> the following described personal property: **marijuana**
>
> Affiant states that there is probable and reasonable cause to believe an[d] affiant does believe that said property constitutes:
>
> . . .
>
> property or things used as the means of committing a crime;
>
> property or things in the possession of a person who intends to use it as a means of committing a crime;
>
> . . .
>
> property or things consisting of evidence which tends to show that a crime has been committed or that a particular person has committed a crime.
>
> Affiant has been a police officer in the aforementioned agency for a period of 8 years and the information and observations contained herein were received and made in his capacity as an officer thereof.
>
> On July 12, 2002, the affiant and other police officers were dispatched to the residence to be searched regarding a domestic all received by the 911 dispatch. Upon arrival at the residence to be searched Loraine Swift asked the affiant to go into the house with her and while in the residence to be searched the affiant saw a marijuana roach in an ashtray on a table inside the residence.[2]

The search warrant that was issued on the basis of this warrant contains the following relevant recitals:

[2] Emphasis supplied.

> Proof by affidavit having this day been made before me by Norman Payton, Ohio County Sheriff's Deputy, that there is probable and reasonable cause for the issuance of this Search Warrant as set out in the affidavit attached hereto and made a part hereof as if fully set forth herein; you are commanded to make immediate search of the premises known and numbered as 8491 Highway 62 East, Rosine, Kentucky, being the residence of Anthony and Loraine Swift, including any and all outbuildings.
>
> And more particularly described as follows: 8491 Highway 62 East, Rosine, Ky. being a tan colored house with a travel trailer in the yard.
>
> and/or in a vehicle or vehicles described as: Any vehicle belonging to Anthony and Loraine Swift located at the above address
>
> and/or on the person or persons of: any and all persons located on the premises at the time of the search
>
> the following described personal property: marijuana

We disagree with Swift's contention that the affidavit and the warrant lacked specificity; they both named the camper in the back yard as an area to be searched. Swift's essential argument, however, is that the camper should not have been included in the scope of the search at all, because it was located twenty feet from the back of his house where the incriminating roach was found. He maintains that he had no means of accessing the camper, and that the police made no

effort to find out if the camper belonged to him or if someone else lived there.

The circuit court conducted a suppression hearing on this issue at which both Swift and Deputy Payton testified. According to Payton, no one advised him that someone other than Swift was staying in the camper; he also testified that the camper was not locked and that Swift's wife was sitting in the open doorway of the camper when the police arrived to search it.

Swift testified that his stepson had been living in the camper for about one month. He insisted that he himself did not have access to the camper, and that the police had to break the lock to get in. He said that he had informed the police that his stepson was living in the trailer.

Swift admitted, however, that he bought the camper in 1998, that it was his property, and that it was located in his back yard.

The trial court in denying the motion to suppress stated that it found it disingenuous that Swift claimed to be unaware that there was marijuana in the camper while large quantities were found in the house and yard, areas undisputedly under his control.

Our standard of review of a decision of the circuit court on a suppression motion follows a two-part test:

> First, the factual findings of the circuit court are conclusive if they are supported by substantial evidence. Second, when the findings of fact are supported by substantial evidence, the question then becomes whether the rule of law as applied to the established facts is violated.[3]

In performing this review, Kentucky courts have adopted the approach of the United States Supreme Court in Ornelas v. United States:[4]

> [A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.[5]

The Kentucky Supreme Court has recently set forth the standard by which a finding of probable cause sufficient to issue a search warrant is to be reviewed:

> The traditional standard for reviewing an issuing judge's finding of probable cause has been that so long as the magistrate had a substantial basis for concluding that a search warrant would uncover evidence of wrongdoing, the Fourth Amendment requires no more.
>
> . . .

[3] Whitmore v. Commonwealth, 92 S.W.3d 76, 79 (Ky. 2002).

[4] 517 U.S. 690, 116 S.Ct.1657, 134 L.Ed.2d 911 (1996).

[5] Whitmore, supra, note 3, citing Ornelas, 517 U.S. at 699.

> [T]he test for probable cause is whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. Probable cause does not require certainty that a crime has been committed or that evidence will be present in the place to be searched.[6]

Our review of the testimony offered at the suppression hearing indicates that there was substantial evidence to support a finding that the camper was under Swift's control, and that there was therefore a fair probability that contraband would be found within it. It was located on Swift's property a short distance from the house where the roach was found, and he admitted that the camper belonged to him. Deputy Payton's testimony further supports the conclusion of the circuit court.

Swift has attempted to liken the circumstances of his case to the scenario in Commonwealth v. Smith,[7] where this Court addressed the constitutional implications of searching structures that contain multiple units or are inhabited by multiple occupants. The camper, however, was simply an outbuilding within the curtilage of Swift's house. The presence of the roach in the hallway provided sufficient probable cause to search not only the house, but by extension the curtilage of the house which included the camper and the yard.

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[6] Moore v. Commonwealth, 159 S.W.3d 325, 329 (Ky. 2005)(citations omitted).
[7] 898 S.W.2d 496 (Ky. App. 1995).

Indeed, under the opinions of federal courts that have addressed this issue, a search of the camper would not have violated the Fourth Amendment even if the warrant had not specifically designated the camper. In United States v. Bennett,[8] for instance, the United States Court of Appeals for the Sixth Circuit approved the search of an outbuilding that was not even mentioned in the search warrant, stating that "there is no need to search for evidence to link the outbuilding to the allegations in the affidavit; the shop building and the residence are sufficiently connected because they are both within the curtilage of the defendant's property."[9] The Court explained that "[a]lthough the affidavit did not swear to any illegal activity in the shop building, the shop building and residence are, for all practical purposes, one single location because the outbuilding is within the curtilage of the 'premises' for which the search warrant was issued."[10]

Similarly, in United States v. Watkins,[11] the same Court cited with approval to a Ninth Circuit opinion,[12] which upheld the search of an entire ranch and all its structures even

[8] 170 F.3d 632 (6th Cir. 1999).

[9] Id. at 639.

[10] Id.

[11] 179 F.3d 489 (6th Cir. 1999).

[12] United States v. Alexander, 761F.2d 1294 (9th Cir. 1985).

though there was a dearth of evidence linking any of the buildings to illegal activity. The validity of the search was upheld because the defendant "owned the entire ranch and it was under his admitted control. Also, the contraband was the type that could be hidden easily in any structure."[13]

The same reasoning applies to the camper in Swift's back yard. It belonged to Swift, it was located on his property, it was under his control, and it was the type of structure in which drugs could easily be hidden.

If we accept Swift's contention that the camper essentially belonged to his stepson, Daniel Sizemore, and that Swift himself had no actual control over it, Sizemore is the only person with standing to challenge the admissibility of the evidence found in the camper. As the Commonwealth has noted, if Swift's testimony at the suppression hearing was true, he had relinquished all expectation of privacy with regard to the camper to Sizemore, thereby abandoning his standing to object to the admissibility of the evidence on Fourth Amendment grounds.[14] We agree with the trial court's observation that the issue of whether the marijuana found in the camper belonged to Swift or not was a question of fact for the jury.

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[13] Id. at 1301.

[14] See e.g. United States v. Brady, 842 F.2d 1313, 1315-16 (D.C. Cir. 1988)(no expectation of privacy in property that has been disclaimed).

Swift's final argument concerning the propriety of the search warrant concerns its authorization of a search of "any and all persons located on the premises." In Johantgen v. Commonwealth,[15] this Court held that an "all persons present" clause in a warrant was invalid for lack of specificity. But in a later case we stated that "[i]t does not necessarily follow . . . that the invalidity of one portion of a warrant will vitiate the entire document. The infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant, but does not require the suppression of anything described in valid portions of the warrant or lawfully seized during its execution."[16] In Swift's case, no contraband was found on the individuals who were searched, and therefore the validity of that part of the warrant is irrelevant.

Swift next argues that the circuit court erred in denying his motion for a continuance of his trial. Swift had requested the continuance because the results of the laboratory tests of the evidence were received only four days before his trial was scheduled to begin. Also, the Commonwealth produced twelve photographs of his property on the day immediately prior to trial.

[15] 571 S.W.2d 110 (Ky.App. 1978).

[16] Smith v. Commonwealth, 898 S.W.2d 496, 502(Ky. App. 1995).

Although Swift has acknowledged that the delay in receiving the laboratory results was due to the backlog at the state testing facility, he argues that the short notice meant that he was deprived of the opportunity to hire his own expert to review, and possibly to challenge, the results. He also claims that the photographs were produced so late that his counsel did not have an opportunity to discuss the photographs with him or to produce his own photographs.

The decision whether or not to grant a continuance lies within the sound discretion of the trial court.[17] The standard of review on appeal for judging the court's decision to deny the motion is whether or not the court abused its discretion.[18]

At the hearing on the motion, the judge agreed with the Commonwealth that Swift had never indicated that he planned to hire an expert to challenge the laboratory test results, although he could have done so at any time before trial. Swift has also not explained how the expert would have assisted his case or how this assistance could have affected its outcome. He has even admitted that he was not certain that he would have hired an expert. The photographs were simply pictures of Swift's own property. Presumably, Swift himself could instantly

[17] Stump v. Commonwealth, 747 S.W.2d 607, 609 (Ky. App. 1988).

[18] Wells v. Salyer, 452 S.W.2d 392, 395-96 (Ky. 1970).

have identified anything prejudicial or inaccurate about the photographs.

Although we agree with Swift that prosecutors should be discouraged from withholding information until the last minute, we cannot agree that the trial court abused its discretion in denying his motion for a continuance.

Swift next argues that the trial court erred in refusing to give an instruction on possession of marijuana as a lesser included offense to the charge of cultivation of marijuana.

KRS 218A.1423, the statute which defines the offense of marijuana cultivation, states in relevant part:

> (1) A person is guilty of marijuana cultivation when he knowingly and unlawfully plants, cultivates, or harvests marijuana with the intent to sell or transfer it.
>
> . . .
>
> (4) The planting, cultivating, or harvesting of five (5) or more marijuana plants shall be prima facie evidence that the marijuana plants were planted, cultivated, or harvested for the purpose of sale or transfer.

KRS 218A.1422 defines possession of marijuana as follows:

> (1) A person is guilty of possession of marijuana when he knowingly and unlawfully possesses marijuana.

The possession of marijuana is a lesser included offense of cultivation.[19] Swift argues that he was entitled to an instruction on possession because the jury could have found that he had planted, cultivated or harvested the marijuana plants found in the back yard, thereby "possessing" them, but had not done so with the intent to sell or transfer the marijuana to another person.

> "[I]t is the duty of the trial judge to prepare and give instructions on the whole law of the case . . . [including] instructions applicable to every state of the case deducible or supported to any extent by the testimony"; and (2) Although a defendant has "a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions," the trial court should instruct as to lesser-included offenses "'only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.'"[20]

The trial court denied defense counsel's request for an instruction on possession as a lesser-included offense of cultivation, on the grounds that Swift had denied that he had

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[19] See Collins v. Commonwealth, 821 S.W.2d 488 (Ky. 1991).

[20] Lawson v. Commonwealth, 85 S.W.3d 571, 574 (Ky. 2002) (citations omitted). See also Luttrell v. Commonwealth, 554 S.W.2d 75 (Ky. 1975), cited in Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993) ("An instruction upon a lesser included charge is proper only if a **reasonable jury** could entertain a reasonable doubt of defendant's guilty upon the greater charge, but still believe beyond a reasonable doubt that defendant is guilty of the lesser charge.")

cultivated the marijuana and “you don’t get [an instruction] on something he denied.”

The Commonwealth contends that the jury could not have believed beyond a reasonable doubt that Swift was guilty only of the lesser charge of possession. The Commonwealth points out that in his testimony Swift expressly denied planting, cultivating or harvesting the marijuana and insisted instead that the marijuana had been planted by Sizemore. Swift also testified that he and Sizemore did not have an agreement to grow and sell marijuana, and that the marijuana found in his house did not come from the plants on his property. In fact, he claimed that he had asked Sizemore to get rid of the plants. Swift also testified that he purchased marijuana for his own personal use. Clearly, Swift’s primary alibi was that the plants were cultivated by his stepson. Although the Commonwealth has compiled considerable evidence supporting the charge of cultivation, much of this evidence could also support a finding that Swift was guilty of the lesser charge of possession.

Upon considering the totality of the evidence, we believe that a jury might have a reasonable doubt as to Swift’s guilt of the charge of cultivation, and yet believe beyond a reasonable doubt that he was guilty of possession. The jury could reasonably have believed that the plants were grown for

Swift's own consumption. He admitted that he was a longtime, heavy marijuana user and that he was fully aware that the plants were in his back yard. Deputy Payton testified that Swift was trying to dispose of the plants when the police arrived to conduct their search. The evidence therefore showed that Swift was a marijuana user who knew he had marijuana plants growing on his property that were fully under his control.

If the view of the Commonwealth is adopted, Swift would have had to admit that he cultivated the plants for his personal use in order to get an instruction on possession. Essentially, he would have had to admit guilt to the lesser offense. This is not required under Kentucky law.

> When the prosecution adduces evidence warranting an inference of a finding of a lesser degree of the charged offense, the court should instruct on the lesser degree even though the defendant presents the defense of alibi.[21]

In Martin v. Commonwealth,[22] the Commonwealth contended that the appellants, who were found guilty of burglary, had not been entitled to an instruction on criminal trespass because they both denied any "unlawful" intrusion into the victim's home. The Supreme Court disagreed, explaining that

[21] Reed v. Commonwealth, 738 S.W.2d 818, 823 (Ky. 1987), citing Trimble v. Commonwealth, 472 S.W.2d 512 (Ky. 1969).

[22] 571 S.W.2d 613 (Ky. 1978).

> [t]his argument can be answered in two ways. First, the [appellants'] claim that the entry was lawful does not make it so; the jury is entitled to draw its own conclusion as to the nature of the entry from all of the evidence. And second, even if a defense is inconsistent with an instruction, that instruction must be given if it is warranted by the evidence.[23]

The Commonwealth has drawn our attention to the presumption created by KRS 218A.1423(4) which provides that the cultivation of more than five plants is *prima facie* evidence of intent to sell or transfer. But the presumption

> serves only to satisfy the Commonwealth's burden of proof sufficiently to avoid a directed verdict of acquittal. . . . The jury is still required to find guilt beyond a reasonable doubt and could disbelieve the evidence giving rise to the presumption. Obviously, failure to rebut a presumption does not result in a directed verdict of conviction.[24]

We therefore remand the case to the circuit court for a new trial on this charge only.

Swift's final argument on appeal concerns an order of the circuit court that appears to direct that he forfeit four tracts of land pursuant to Kentucky Revised Statutes (KRS)

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[23] Id. at 615.

[24] William S. Cooper, Kentucky Instructions to Juries, § 107, p. 20 (1999) citing Commonwealth v. Collins, supra, note 19; Jackson v. Commonwealth, 670 S.W.2d 828 (Ky. 1984); Mason v. Commonwealth, 565 S.W.2d 140 (Ky. 1978); Robinson v. Commonwealth, 572 S.W.2d 606,609 (Ky. App. 1978); Rader v. Commonwealth, 242 S.W.2d 610 (1951).

218A.410(k). The Commonwealth agrees with Swift that the only property that is subject to forfeiture is the so-called Rosine tract.

We agree that the forfeiture order requires clarification to show that it applies only to the Rosine tract. However, because the outcome of Swift's new trial on the cultivation charge may affect the court's decision regarding the forfeiture of that property, we remand this portion of the case to the circuit court to await its reconsideration after the trial.

We therefore reverse the conviction for cultivation and remand that charge to the circuit court for a new trial at which Swift will be entitled to an instruction on the lesser included offense of possession of marijuana. The convictions for trafficking and possession of drug paraphernalia are affirmed. The forfeiture order is reversed and this case is remanded for reconsideration pending the outcome of the new trial.

ALL CONCUR.

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