

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001371-MR

TIMOTHY COLLIER

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 11-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

CAPERTON, JUDGE: Timothy Collier appeals from a judgment sentencing him to serve seven years for attempt to manufacture methamphetamine. Collier entered a guilty plea to the charge, conditioned on his right to appeal the trial court's denial of his motion to suppress evidence recovered from a warrantless search of his trailer. Collier also challenges the levying of court costs. We affirm the trial

court's denial of the suppression motion, and vacate and remand for further proceedings only as to the issue of the court costs.

On February 23, 2011, Detective Preston Herndon of the Henderson Police Department received a phone call from a confidential informant who had provided him with reliable information in the past. The informant told Detective Herndon that he or she had just left Timothy Collier's trailer, where Collier was engaged in manufacturing methamphetamine. The informant stated that Collier lived on Lot #11 of a trailer park at 2310 Adams Lane.

Detective Herndon, accompanied by Detective Ramsey, went to the trailer park at around 10:30 a.m. to investigate. The trailer on Lot #11 was in close proximity to several other trailers, some within twenty-five feet. When the detectives arrived, they observed a power cord running from Collier's trailer to the neighboring trailer. Detective Herndon detected a chemical odor which he recognized as being associated with methamphetamine labs.

After speaking briefly with a woman at the neighboring trailer, Detective Herndon knocked on the front door of Collier's trailer. There was no response. As the detectives walked to the back door of his trailer, they noticed that a window was open, and that the chemical odor had grown stronger and was emanating from the window. They knocked and announced their presence at the back door, identifying themselves as the police and calling Collier by name. There was no response.

Herndon is a sixteen-year veteran officer whose primary focus is narcotics investigations. He has specialized training in narcotics investigations, including certification in methamphetamine lab investigations and removal. He decided that it was imperative to enter the residence, based on his knowledge of the volatile nature of methamphetamine labs and the danger they posed to people inside the trailer and the public in general. Herndon obtained a crow bar from his vehicle and pried open the front door.

Herndon entered the trailer and saw an individual later identified as Paul Schini lying on the living room floor in a submissive position. On the floor a few feet from Schini, Detective Herndon observed scales, rolling papers, Coleman fuel, and Sudafed tablets. These are all items Herndon associated with the manufacture of methamphetamine. After Schini was secured, Herndon attempted to locate Collier. He moved through the residence while announcing himself. He heard Collier's voice stating that he was using the bathroom. Herndon looked in the bathroom and saw Collier sitting on the toilet. Herndon told him not to flush. After Collier came out of the bathroom, Herndon directed him to lie on the floor with Schini. Herndon called another police unit to help secure Collier and Schini.

Herndon and Ramsey proceeded to search the trailer. In the living room, Herndon saw a hole covered by plywood and some pieces of tubing nearby which are commonly used in methamphetamine manufacture. Up to that point, Herndon had been unable to find the source of the chemical smell. He lifted the plywood but was unable to reach an object he saw in the hole. He went outside, removed

some of the trailer's underpinning, then crawled underneath and retrieved a jar containing a clear liquid and white powder which field tested positive for methamphetamine.

Meanwhile, Detective Ramsey found another glass jar containing an active chemical reaction, hidden in a hole in the bedroom floor. Other officers arrived and found two jugs of "Liquid Fire," an ingredient of methamphetamine. The police proceeded to dismantle and clean up the apparent methamphetamine lab.

Collier moved to suppress the evidence found during the search, arguing that the police officers had no probable cause to believe they would find evidence of a crime inside the trailer, and that even if they did their entry was not justified by any exigency that would have made obtaining a warrant impracticable.

Following a hearing, the trial court concluded that the Commonwealth had met its burden of proving an exception to the warrant requirement. The trial court found that Detective Herndon's investigation was based on a reliable tip that was further corroborated by the chemical odor he detected when he arrived at the trailer. The trial court further found that the officers' entry into the trailer was justified by exigent circumstances, because the manufacture of methamphetamine is inherently dangerous and can create situations where there is a risk of harm to the police and others. The trial court alluded to Detective Herndon's familiarity with the risks of this process, and found that it was reasonable to believe there was a danger to Collier himself or to the public, especially since the residences in the trailer park were so closely spaced.

Collier entered a guilty plea to an amended charge of attempt to manufacture methamphetamine, conditioned on his right to appeal the trial court's suppression ruling. A sentence of seven years and court costs in the amount of \$155 were express conditions of the plea offer. He was sentenced in accordance with the plea agreement, and this appeal followed.

Upon appellate review, our Court will affirm the trial court's findings of fact if those findings are supported by substantial evidence. Kentucky Rules of Criminal Procedure (RCr) 9.78. We will only examine the trial court's findings for clear error and give deference to reasonable inferences made from the evidence. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002), quoting *Ornelas v. U.S.*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996). If the court's findings of fact are supported by substantial evidence, we will conduct a *de novo* review of the court's application of the law to the facts. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002).

“Absent exigent circumstances, law enforcement officers may not enter an individual's private residence in order to conduct a warrantless search.” *Commonwealth v. McManus*, 107 S.W.3d 175, 177 (Ky. 2003) (internal citation omitted). “Destruction of evidence is a recognized exigent circumstance creating an exception to the warrant requirement.” *Id.* Another recognized exigent circumstance is the existence of “a risk of danger to police or others.” *Bishop v. Commonwealth*, 237 S.W.3d 567, 569 (Ky. App. 2007) (internal citations omitted).

Collier contends that the trial court's finding that Detective Herndon "saw a hole in the floor covered by plywood" was clearly erroneous, unless the detective was able to see through plywood. He points to the fact that Herndon later "clarified" his testimony and stated that he did not know what was under the plywood. Although the trial court's finding is predicated on the subsequent discovery of the hole, the finding is clearly intended to indicate that Herndon observed the plywood, thought it looked suspicious, and decided to investigate what was beneath it. The finding is therefore not clearly erroneous. More importantly, Collier has not explained how this allegedly erroneous finding undermines the trial court's conclusion that the warrantless search was justified by exigent circumstances.

Collier also disputes the finding that Herndon "smelled a chemical odor he knew to be related to making methamphetamine." Collier points to Herndon's testimony that he does not have "that good a nose" and that he could not identify the type of odor he detected, or even say that it was an "illegal chemical smell." Although Herndon was unable to identify the odor specifically as that produced by the manufacture of methamphetamine, it was nonetheless a strong chemical smell emanating from a trailer that a reliable informant had just told him was the site of an active methamphetamine lab. Under these circumstances, this corroborative evidence was sufficient to conclude that exigent circumstances existed. *See Bishop*, 237 S.W.3d at 569 (methamphetamine production in a public place is an inherently dangerous act, justifying exception to warrant requirement).

Collier argues that Herndon's testimony and actions as a whole show only that he wanted to enter the trailer to find incriminating evidence, and that he had no concern for anyone's safety. As evidence that Herndon was not concerned with public safety, Collier points to the fact that the detective kept Schini and Collier inside the potentially dangerous trailer while he and the other officers searched the premises, and that during the thirty minutes between the arrival of the police and Detective Ramsey's discovery of the active meth lab under the bedroom floor, Herndon took no action to keep the other residents of the trailer park safe, not even the woman and small children residing nearby in the adjacent trailer.

Herndon testified that meth labs are dangerous; that the chemicals they emit can be fatal; that labs have been known to explode; and that the close proximity of the trailers could create a measure of danger for the surrounding area. Although Herndon did not order the evacuation of any inhabitants of the trailer park, he testified that the first thing he wanted to do upon entry was to find the source of the chemical smell in order to identify the dangers. He testified that some methods of manufacturing methamphetamine are more dangerous than others, but he was unable to determine which was being used simply based on the smell. He also testified that he believed it was safe to remain in the residence once the source of the smell had been identified and removed.

Although an evacuation of the residents of the trailer park was an option, Detective Herndon's decision to try to locate and remove the meth lab instead is fully in keeping with his concern for the safety of everyone nearby. Furthermore,

it is difficult to know how Herndon could have evacuated Collier and Schini without forcibly entering the trailer since they refused to answer the door.

Collier further disputes the trial court's conclusion that Herndon found items involved in the manufacture of methamphetamine in plain sight. Herndon testified that upon his entry into the trailer, he saw scales, rolling paper, Coleman fuel and Sudafed tablets. Collier maintains that the court's finding is "incomplete" because the meth oil¹ and active lab were found in the holes covered with plywood. Collier does not explain why this finding undermines the trial court's conclusion that exigent circumstances justified the warrantless entry and search, nor does he argue that the scope of the search was impermissible. If anything, the presence of several of the ingredients associated with the manufacture and use of methamphetamine could serve to heighten the officer's sense of potential danger. Moreover, possession with intent to manufacture only two of the ingredients or items of equipment necessary for the manufacture of methamphetamine is sufficient to obtain a conviction pursuant to Kentucky Revised Statutes (KRS) 218A.1432(1)(b).

Collier contends that upholding the trial court's ruling would allow police officers to bypass the warrant requirement simply by claiming that they detected a chemical smell associated with methamphetamine manufacture. But in this case, there was corroborative evidence: Detective Herndon had just received a tip from a

¹ This is the term that was used by the officer; it was not explained. We do not know what it is, how it is used, how it is prepared, the components that constitute the mixture, nor do we offer any explanation for it.

reliable informant that the drug was being contemporaneously manufactured. Furthermore, the trial court had the opportunity to assess the credibility of Detective Herndon. “At a suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court.” *Sowell v. Commonwealth*, 168 S.W.3d 429, 431 (Ky. App. 2005). The trial court did not abuse its discretion in concluding that Detective Herndon was a reliable witness and that exigent circumstances supported the warrantless search of the trailer.

Collier’s second argument is that the trial court erred in ordering him to pay court costs of \$155 because he was found to be an indigent defendant, was represented by the Department of Public Advocacy and was allowed to proceed in forma pauperis on appeal.

“Fines and costs, being part of the punishment imposed by the court, are a part of the sentence imposed in a criminal case.” *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010). The imposition of a sentence that exceeds the “lawful range of punishment established by the General Assembly, . . . whether agreed upon or not, . . . is a violation of the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution, and is an abuse of discretion.” *McClanahan v. Commonwealth*, 308 S.W.3d 694, 698 (Ky. 2010).

Court costs may be imposed on an indigent defendant, “unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the

foreseeable future.” *Smith v. Commonwealth*, 361 S.W.3d 908, 921 (Ky. 2012) (citing KRS 23A.205). The trial court did not make such a finding in this case.

The Commonwealth contends that the imposition of costs in this case was not an illegal sentence, because court costs are mandatory except for a limited category of defendants. It asserts that even if Collier qualifies as a poor person who is exempt from paying costs, he should not be prevented from waiving his statutory exemption as part of a negotiated plea agreement. Although it is true that defendants may waive statutory rights, *Padgett v. Commonwealth*, 312 S.W.3d 336, 348 (Ky. 2010), sentencing issues pertaining to the terms of an unconditional guilty plea may nonetheless be raised on appeal.

We begin by noting that “[w]hile an unconditional guilty plea waives the right to appeal many constitutional protections as well as the right to appeal a finding of guilt on the sufficiency of the evidence, there are some remaining issues that can be raised in an appeal,” including “sentencing issues.” *Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky.2008) (internal citations omitted).

Commonwealth v. Reed, 374 S.W.3d 298, 300 (Ky. 2012).

Claims that “a sentencing decision is contrary to statute . . . or was made without fully considering what sentencing options were allowed by statute” are characterized as jurisdictional issues. *Grigsby v. Commonwealth*, 302 S.W.3d 52, 54 (Ky. 2010). Consequently, these types of claims “may at least be raised before an appellate court and considered on their merits, notwithstanding a waiver of the right to appeal.” *Id.*

Thus, we reverse the trial court's imposition of court costs, and remand for a determination of whether Collier is: (1) a poor person as defined by KRS 453.190(2); and (2) unable to pay court costs now, and will be unable to pay court costs in the foreseeable future. The judgment is affirmed in all other respects.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert C. Yang
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE

Jack Conway
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General
Frankfort, Kentucky