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RENDERED: SEPTEMBER 23, 2010

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000204-MR

FINAL

DATE ¹⁰⁻¹⁴⁻¹⁰ D. Hagg
APPELLANT

CHARLES DEARMOND

V. ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
NO. 09-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Charles Alan Dearmond, appeals from a Judgment of the Muhlenberg Circuit Court, entered upon a conditional guilty plea. Subsequent to the trial court's partial denial of his suppression motion, Appellant pled guilty to manufacturing methamphetamine and to being a first-degree persistent felony offender (PFO1), reserving the right to appeal the trial court's suppression ruling. He was sentenced to twenty years imprisonment on the primary offense, enhanced to twenty-four years by the PFO1 status. Accordingly, Appellant appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting error in the trial court's denial of his motion to suppress certain evidence seized from his girlfriend's residence as well as his confession.

Discerning no error in the trial court's suppression ruling, we affirm Appellant's convictions and sentence.

RELEVANT FACTS

Appellant's convictions stem from evidence discovered during a search of the home of Appellant's girlfriend, Mary Dukes. There was an outstanding arrest warrant for Dukes' son, Jeff Oliver, and the police had been searching for him for several days when they received information that Oliver would be at Dukes' home on January 8, 2009, around 8:30 p.m. for the purpose of picking up some Sudafed. In response, the police set up surveillance of the home. Around 10:00 p.m., two persons emerged from some woods behind the home and went in, but the police could not identify them. At that point, the police knocked on the door and asked Dukes for permission to search the home for Oliver. With her consent, the officers began searching the home. In his search of an upstairs bedroom, Deputy Sheriff Terry Vick opened a closet and saw a mound of clothes piled up on the closet floor. Suspecting that Oliver might be hiding under the clothes, Deputy Vick lifted them up only to find two clear mason jars containing a wet, white substance along with wadded up coffee filters. Deputy Vick also smelled a strong odor, which he recognized as ether. Based on his prior experience, Deputy Vick suspected these materials were part of a methamphetamine lab. Testing later confirmed the substance in the jars to be pseudoephedrine. Continuing the search, officers also discovered several items in plain view including a baggie containing a crushed white substance and a police scanner and monitoring system. The officers also

retrieved some lithium batteries from a pair of coveralls hanging in the bedroom. After discovering these materials, Appellant and Dukes were both Mirandized and arrested. Appellant then admitted to manufacturing methamphetamine but maintained that he was the only one involved.

Based on the foregoing, Appellant was indicted for manufacturing methamphetamine, second or subsequent offense, or by complicity; possession of a controlled substance in the first degree, second or subsequent offense, or by complicity; and for being a PFO1. Appellant filed a motion to suppress the evidence seized from the home. The trial court granted the motion only with respect to the lithium batteries. Although the search of the coveralls exceeded the scope of the consent given to search, the trial court found that all other items were discovered in the course of a search consistent with the consent given. Specifically, Dukes expressly consented to a search of the home for her son, Oliver. The trial court found that it was objectively reasonable for Deputy Vick to suspect that Oliver might be hiding inside the closet under the pile of clothing. Although Dukes testified at the suppression hearing that the clothes were contained in a silver tub that was too small for a person to fit in, Deputy Vick testified that the clothes were merely piled up in the closet floor, two to three feet deep. In its suppression ruling, the trial court found Deputy Vick's testimony more credible than that of Dukes and further concluded that it was reasonable for Deputy Vick to suspect Oliver could be hiding beneath the clothes, rendering Deputy Vick's search under the clothes to be within the scope of the consent Dukes had granted. Moreover, except for the batteries,

the trial court found that the remaining items were in plain view. Additionally, the trial court concluded that Appellant's confession was admissible because it was made only after he had been advised of his constitutional rights.

Upon the trial court's substantially adverse suppression ruling, Appellant entered a conditional plea agreement wherein the possession charge was dropped and the second or subsequent aspect of the manufacturing charge was dropped, with Appellant pleading guilty to manufacturing methamphetamine and PFO1 in exchange for a twenty-four-year sentence. Before this Court, Appellant asserts error in the trial court's suppression ruling, the issue he explicitly reserved the right to appeal.

ANALYSIS

The Trial Court Properly Denied Appellant's Suppression Motion Because the Officer Did Not Exceed the Scope of Dukes' Consent to Search.

Appellant maintains that lifting up the pile of clothes exceeded the scope of the consent to search because a person could not have been hiding underneath them. Thus, he reasons that the mason jars and coffee filters should have been suppressed. Further, he asserts that his subsequent confession was fruit of this poisonous tree and should have been suppressed as well. We disagree.

A two pronged approach is utilized to review a trial court's suppression ruling. *Commonwealth v. Neal*, 84 S.W.3d 920 (Ky. App. 2002). First, we must determine whether the trial court's factual findings are supported by substantial evidence. If so, then they are conclusive. RCr 9.78. Next, we must

determine whether, based on those findings, the trial court properly applied the law. In this regard, our review is *de novo*. *Neal*, 84 S.W.2d 920.

Turning to the first prong, the trial court's factual findings in the instant case are supported by substantial evidence; namely, Deputy Vick's testimony. Although Dukes testified that the clothes in question were contained in a tub that was too small to contain a person, Deputy Vick testified that the clothes were merely piled up, two to three feet deep, on the closet floor. Moreover, a photograph taken the night of the search was submitted by the Commonwealth. Although the photograph was taken after the clothes had been removed from the closet and had been restacked in front of the closet, no silver tub can be discerned in the photograph. The photograph submitted by Dukes was taken after she recreated the scene as she claimed it to have been prior to the search. Additionally, the trial court stated that while Deputy Vick had no prior connection with Appellant, Dukes was Appellant's girlfriend, suggesting a stronger possibility of bias in her testimony. Furthermore, as the trier of fact in a suppression hearing, the trial court is in the best position to judge the credibility of the witnesses. *Henson v. Commonwealth*, 20 S.W.3d 466 (Ky. 1999). Overall, the trial court's factual findings here were supported by substantial evidence and are conclusive.

Turning now to the second prong of the analysis, the trial court did, indeed, properly apply the law to its factual findings. Appellant contends that it was unreasonable to construe Dukes' consent to search for a person as a consent to search every nook and cranny of her home, including under a pile of

clothes in a small closet. In measuring the scope of a person's consent to search under the Fourth Amendment, an objective reasonableness standard is employed. In other words, "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990)).

In the case at bar, it was certainly objectively reasonable for Deputy Vick to suspect that the person for whom he was searching might be hiding in the closet. Moreover, the Commonwealth cites to several cases wherein suspects were found hiding under clothes. For example, in *Butler v. Commonwealth*, 536 S.W.2d 139 (Ky. 1976), a suspect was discovered "lying under a pile of clothes in a bedroom closet." Likewise, *State v. Hanson*, 528 P.2d 660 (N.M. App. 1974) and *United States v. Meyers*, 308 F.3d 251 (3rd Cir. 2002), involved suspects who were found hiding under a pile of clothes. Further, Deputy Vick testified that he, himself, had encountered suspects hiding under clothes in confined areas. Accordingly, we cannot say that it was objectively unreasonable for Deputy Vick to suspect that Oliver might have been hiding under the pile of clothes in the bedroom closet. As such, he did not exceed the scope of Dukes' consent and the trial court properly denied Appellant's motion to suppress the evidence seized. Consequently, Appellant's subsequent confession cannot be said to be fruit of a poisonous tree.

Finally, Appellant attempts to argue before this Court that the officers had probable cause to obtain a search warrant prior to their entry of Dukes'

home. The Commonwealth responds that Appellant's suppression motion asserted that the "the search was conducted without probable cause," and Appellant never asserted otherwise to the trial court. There is no merit to Appellant's assertion and given his failure to raise the argument in the trial court, we need not address it further. *Shelton v. Commonwealth*, 992 S.W.2d 849 (Ky. 1999).

CONCLUSION

Because it was objectively reasonable for Deputy Vick to search for Oliver under the pile of clothes, the search did not exceed the scope of the consent given to search. Therefore, the trial court properly denied Appellant's motion to suppress the evidence found under the clothes and his subsequent confession. Appellant's convictions and sentence are affirmed.

All sitting. All concur.

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