

RENDERED: January 24, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001696-MR

DONNIE RAY DURHAM

APPELLANT

v. APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 01-CR-00031

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: COMBS, GUIDUDLI, AND PAISLEY, JUDGES.

PAISLEY, JUDGE: Appellant, Donnie Ray Durham, appeals from a final judgment of the McLean Circuit Court, entered after a conditional guilty plea to the charges of tampering with anhydrous ammonia equipment and possession of marijuana. Appellant contends that the circuit court erred by denying his motion to suppress evidence. However, as our review of the record indicates that this particular issue was not properly preserved for appellate review, we affirm.

On April 11, 2001, Deputy Terry Wetzel and a

four-person team of the Kentucky National Guard Counter Drug Program were conducting surveillance at the Miles Supply Store, which had reported thefts of anhydrous ammonia from the storage tanks located outside the store. At about 2:30 a.m., one of the team members, Jody Harris, observed a vehicle approach on the road and let appellant out before driving away. Appellant, who was carrying a gallon container, began to approach the anhydrous ammonia storage tanks. When appellant got within about fifteen feet of the tanks, he stopped for a couple of minutes and then turned around and returned to the road where the vehicle had previously let him out.

At this point, Harris detained appellant, who was still carrying the gallon container and also a rubber bicycle inner tube. Harris later testified that he had seen both of these items frequently used in the theft of anhydrous ammonia. In addition, Harris found marijuana on appellant's person when he conducted a routine weapons check. Appellant was then placed under arrest.

Following his indictment, appellant filed a motion to suppress the evidence obtained during his arrest. After the court denied this motion, appellant moved the court to dismiss the tampering with anhydrous ammonia equipment charge on the grounds that the statute, KRS 250.4892, is overbroad and vague. The court also denied this motion. Thereafter, on June 18, 2001,

appellant entered a conditional plea of guilty pursuant to RCr 8.09, which states:

With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal.

The transcript of the guilty plea hearing shows that appellant's attorney specifically stated: "He's [Mr. Durham] also going to enter a conditional plea, but only to the overbreadth of the statute." During the hearing, the court explained to appellant that he was waiving certain constitutional rights, including the right to appeal an adverse verdict. The court then stated, "[a]nd you're understanding that by pleading guilty in this case, you still will have a right to appeal the constitutionality of the statute." In addition, the guilty plea form includes a notation which reads: "Conditional Plea KRS 250.4892," indicating that the only issue preserved for appeal pertained to that statute.

The record is devoid of any reference by appellant as to the preservation of his right to appeal the circuit court's denial of his motion to suppress. Clearly, RCr 8.09 requires that the issue which is intended to be reserved in a conditional plea must be specified and in writing. Without such reservation of rights, it is well settled that "a plea of guilty constitutes a waiver of all defenses other than that the indictment charged

no offense.” Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986), citing Sanders v. Commonwealth, Ky. App., 663 S.W.2d 216, 218 (1983). See also Toppass v. Commonwealth, Ky. App., 80 S.W.3d 795, 798 (2002). Appellant waived his right to appeal the denial of his motion to suppress because he failed to comply with RCr 8.09 by not specifying in writing that he was reserving such right in his conditional plea.

Moreover, we are not persuaded that appellant is entitled to relief in order to prevent the occurrence of manifest injustice. RCr 10.26. The circuit court found that appellant’s strange behavior and the recent reports of theft provided the officers with reasonable suspicion to believe the appellant might be engaged in criminal activity. This gave the officers a right to detain him and investigate. The items that appellant was carrying were themselves in plain view, providing the officers with probable cause to believe that appellant was in the process of committing a felony. In addition, the officers had a right to do a weapons search of appellant for their own safety and incident to arrest, and the search of the vehicle was done with the voluntary consent of the driver. The court’s findings were supported by substantial evidence, and both reasonable suspicion and probable cause were present as a matter of law. Thus, it is clear in any event that appellant was not entitled to suppression of the evidence.

The judgment is affirmed.

ALL CONCUR.

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