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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002030-MR
AND
NO. 2001-CA-002080-MR

DEREK SHAROD POTTER; AND
AARON THOMAS HAMILTON APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NOS. 00-CR-00543-001 & 00-CR-00543-002

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Derek Potter and Aaron Hamilton have appealed from the judgments and sentences of the Warren Circuit Court entered on September 17, 2001.[1] Potter was convicted of trafficking in marijuana more than five pounds,[2] possession of

[1] While their appeals have not been consolidated, this Court ordered that the cases be heard together and the cases will be decided in this joint Opinion.

[2] Kentucky Revised Statutes (KRS) 218A.1421(1)(4).

drug paraphernalia,[3] and possession of a concealed deadly weapon.[4] Hamilton was convicted of trafficking in marijuana more than five pounds, possession of drug paraphernalia, and possession of marijuana less than eight ounces.[5] Potter claims that the trial court erred by denying his motion to suppress evidence seized during a warrantless search of his apartment. Hamilton claims that the trial court erred by denying his motion to sever the trials; by not suppressing certain evidence; by admitting inadmissible, prejudicial evidence; and by allowing improper closing arguments. Having concluded that the trial court's findings in its order denying the motions to suppress were supported by substantial evidence and that the trial court's application of the law to those facts was correct as a matter of law, we affirm the trial court's denial of the motions to suppress. Having further concluded that the trial court did not abuse its discretion in making the various procedural and evidentiary rulings at trial, we affirm on all trial issues as well.

On February 10, 2000, the Bowling Green Police Department received a loud music complaint at 213-B Amy Avenue,

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[3] KRS 218A.500.

[4] KRS 527.020.

[5] KRS 218A.1421(1)(2).

an apartment in Bowling Green, Kentucky. When Officer Brad Bowles responded to the call, he did not hear loud music, but he did hear several voices coming from inside the apartment, and he smelled burnt marijuana coming from the apartment. Prior to making contact with the apartment's occupants, Officer Bowles radioed Officer Tod Young and requested assistance. Officer Young arrived on the scene within one minute and went to the back of the apartment to determine whether it had a back door and to make sure no one tried to flee the scene.

Officer Bowles went to the front door and knocked several times. After knocking, he detected a great deal of "commotion" going on inside the apartment. He testified that he heard a lot of loud voices and people "scurrying" towards the back of the apartment. When no one answered, Officer Bowles knocked again and announced that he was with the Bowling Green Police Department. During this time, Officer Young noticed that the rear window to the apartment opened and a "billow" of marijuana smoke escaped from the apartment. A female stuck her head out of the window and Officer Young instructed her to have someone answer the door.

When Hamilton answered the door, Officer Bowles without consent entered the residence, because he believed that there were exigent circumstances involving the threat of loss or

destruction of evidence. Officer Bowles testified that when he entered the apartment he saw a cloud of marijuana smoke in the room and that he smelled fresh, unburnt marijuana. For his safety, Officer Bowles requested that all of the occupants come to the living room and be seated. Officer Bowles then asked Hamilton for permission to search his person and Hamilton consented. Meanwhile, Officer Young did a sweep of the apartment and discovered a trail of marijuana leading to the bathroom.

Just as Officer Bowles was beginning his search of Hamilton, he noticed Potter, who was sitting in the floor, stuffing something behind a stereo speaker. Officer Bowles immediately requested that Officer Young secure Hamilton while he patted down Potter. Officer Bowles discovered a Taurus 38-calibur revolver in Potter's back pocket and more than $400.00 in cash during the pat down. He also found a sum of cash in the stereo speaker. Officer Bowles then handcuffed Potter, indicating that he was not being placed under arrest, but was merely being handcuffed for the officers' safety. Once Potter was handcuffed, Officer Bowles asked him where the marijuana was located and indicated to him that they would call for the police K-9 unit if Potter did not tell him. Potter responded that there was some marijuana in a drawer in the kitchen. Officer

Bowles then asked for consent to search the apartment and Potter consented.

Officer Kevin Renfrow and his drug dog, Blitz, were called to the apartment. A search of the kitchen cabinets by the K-9 unit turned up several gallon-sized freezer bags containing marijuana, in addition to scales and baggies. Blitz also alerted on a Rubbermaid container in the bedroom closet which contained a trash bag filled with gallon-sized freezer bags full of marijuana, and a large amount of loose detergent, which is often used to mask the odor of marijuana. The officers also discovered over $8,000.00 cash in the bedroom closet, and a substantial amount of marijuana was located in the bedroom in a banana box.

While Officer Bowles was with Potter, Officer Young resumed the search of Hamilton and located a small amount of marijuana and $3,000.00 cash on his person. Officer Young also discovered a rental car key in Hamilton's pocket. Hamilton informed the officer that he had driven from Indianapolis, Indiana, in a rental car. The large quantity of marijuana and cash, along with the loose detergent, caused the officers to suspect that Hamilton's rental car had been used to transport the marijuana. Based on this suspicion, the K-9 unit did a walk-around of the vehicle and the dog alerted to the back

passenger door. The officers used Hamilton's key to unlock the door and located marijuana residue and seeds in the back passenger-side seat and floorboard, as well as the trunk of the vehicle.

The following day Officer Bowles obtained a search warrant to re-enter the vehicle and collected the marijuana with an evidence vacuum. Officer Bowles also acquired a search warrant to re-enter the apartment and seized the Rubbermaid container.

Potter's and Hamilton's motions to suppress the seized evidence were denied.[6] The trial court ruled that the warrantless entry of Potter's apartment was justified due to exigent circumstances and that the searches of Potter's apartment, Potter's person and Hamilton's person were consensual. The trial court also ruled that there was probable cause to justify the search of Hamilton's rental car. Potter and Hamilton were tried jointly before a jury and convicted of all the charges. Each appellant was sentenced to five years' imprisonment. These appeals followed.

In their separate appeals, Potter and Hamilton have raised some of the same issues and some separate issues. Potter

[6] The trial court granted Potter's motion to suppress the incriminatory statements he made to Officer Bowles prior to his being Mirandized. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), rehearing den'd, 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed.2d 121 (1966).

claims the trial court erred when it refused to suppress the evidence seized following the warrantless entry and search of his apartment on the grounds that the entry was not justified by exigent circumstances and that the search which followed was tainted and not consensual and thus violative of the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. Hamilton claims the trial court erred (1) by refusing to sever the defendants' trials; (2) by admitting improper evidence; (3) by refusing to suppress the evidence seized from Potter's apartment, Hamilton's person and rental car; (4) by denying a motion for a mistrial or severance after Potter intentionally violated the trial court's order in granting a motion _in limine_ regarding Hamilton's ability to post bond; (5) by denying a motion for a mistrial or severance after the Commonwealth intentionally violated the trial court's order in granting a motion _in limine_ regarding Hamilton's silence after being arrested; (6) by improperly admitting expert witness testimony; (7) by allowing the Commonwealth to make an improper closing argument; and (8) by denying his motion for a new trial based upon alleged exculpatory evidence contained on the police department's 911 audiotape which could not be located.

Since the issues raised by Potter concerning the denial of the motion to suppress affect both appellants, we will

address those issues first. This Court's "standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence."[7] If those findings are supported by substantial evidence, then they are conclusive.[8] "Based on those findings of fact, we must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law."[9]

The United States Constitution commands that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[10]

AThe Fourteenth Amendment incorporates the Fourth Amendment, prohibiting unreasonable searches and seizures by the states.@[11]

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[7] Commonwealth v. Neal, Ky.App., 84 S.W.3d 920 (2002).

[8] Kentucky Rules of Criminal Procedure (RCr) 9.78.

[9] Neal, supra (citing Commonwealth v. Opell, Ky.App., 3 S.W.3d 747, 751 (1999); and Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998)).

[10] U.S. Const. Amend. IV.

[11] O=Brien v. City of Grand Rapids, 23 F.3d 990, 996 (6th Cir. 1994) (citing Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)).

The Kentucky Constitution accords the same rights.[12] A war at the entrance to the house,@ adding that A[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant.@[13] AIt is a >basic principle of Fourth Amendment law= that searches and seizures inside a home without a warrant are presumptively unreasonable.@[14] Furthermore, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[15] Nevertheless, there are exceptions to this warrant requirement, including Ahot pursuit of a fleeing felon, or imminent destruction of evidence, . . . or the need to prevent a suspect=s escape, or the risk of danger to the police or to other persons inside or outside the dwelling.@[16]

In the case sub judice, Officer Bowles testified that he believed that exigent circumstances existed for entering the apartment due to the possible destruction of the marijuana.[17]

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[12] Ky. Const. § 10.

[13] Payton v. New York, 455 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639, 653 (1980).

[14] Id. at 590; see also Coolidge v. New Hampshire, 403 U.S. 443, 474-75, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

[15] United States v. United States District Court, Eastern District of Michigan, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972).

[16] Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

[17] It was certainly reasonable for Officer Bowles to conclude that an occupant of the apartment at least possessed marijuana. However, since possession of

Potter argues that since Office Bowles had probable cause to believe that a crime was being committed, that this information could have been used to secure the premises and to obtain a search warrant. Potter argues that exigent circumstances did not exist, and that the warrantless entry into and subsequent search of his apartment was not justified.

Potter notes that Awarrantless entries based upon the odor of narcotics have been prohibited.@[18] The facts of Johnson, supra, are very similar to the case sub judice. In Johnson, police officers received information that unknown persons were smoking opium in a hotel room. Once arriving at the hotel, both police officers and federal narcotics agents recognized a strong odor of burning opium from the defendant=s hotel room. After knocking and announcing their presence, the officers heard some shuffling inside the room. According to a police detective, after the defendant admitted the agents into her room, they searched her room. The search revealed opium and opium paraphernalia.

The trial court denied the defendant=s motion to suppress, and the United States Court of Appeals for the Ninth

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marijuana is only a Class A misdemeanor, KRS 218A.1422(2), a warrantless arrest could not have been made unless the misdemeanor was actually committed in Officer Bowles=s presence. KRS 431.005(1)(d).

[18] See Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed.2d 436 (1948).

Circuit affirmed. However, the Supreme Court reversed, stating that A[a]t the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant.@[19] Similarly, in the case sub judice, after smelling the odor of burning marijuana emanating from Potter=s apartment, Officer Bowles possessed sufficient evidence with which a magistrate could find probable cause to issue a search warrant.

The Court in Johnson clarified that the decision in Taylor v. United States,[20] only holds Athat odors alone do not authorize a search without a warrant.@[21] The Supreme Court further held that

> [i]f the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.[22]

In Taylor, prohibition agents had received complaints that the defendant was involved in the sale of illegal liquor

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[19] Id. at 13.

[20] 286 U.S. 1, 52 S.Ct. 466, 76 L.Ed.2d 951 (1932).

[21] Johnson, 333 U.S. at 13.

[22] Id.

from a garage next to his residence, both of which were on the same premises. As the agents approached the garage they smelled the odor of whiskey coming from within the garage. After looking in and seeing what they thought to be liquor, they broke into the garage and found whiskey. During this search, the defendant came from his house into the garage and was arrested. It was determined by the trial court that the search and seizure were properly undertaken in order to secure evidence.

The United States Court of Appeals for the Fourth Circuit affirmed the conviction. However, the Supreme Court reversed, holding that Athe agents made no effort to obtain a warrant for making a search.@[23] The Supreme Court further added that the agents

> had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.[24]

In the case sub judice, the Commonwealth argues that A[b]ecause of the smell of marijuana, and the scurrying and commotion he heard inside the apartment, Bowles concluded that an exigent circumstance existed for entering the apartment due

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[23] Taylor, 286 U.S. at 6.

[24] Id.

to the possible destruction of evidence, i.e., marijuana.@ The Commonwealth further argues that exigent circumstances existed because the apartment=s occupants were aware that the police were at the door; thus, the marijuana could be readily destroyed.[25]

"[T]he police bear a 'heavy burden when attempting to demonstrate an urgent need' that might justify a warrantless entry."[26] "Exigent circumstances justify a warrantless entry into a home only where there is also probable cause to enter the residence."[27] It has also been made clear that "the exigent-circumstances exception in the context of a home entry 'should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed."[28]

We must determine whether the trial court's factual findings that Officer Bowles's entry was due to exigent circumstances were supported by substantial evidence. The exigent circumstances exception providing for a warrantless entry "may be particularly compelling where narcotics are involved, for 'narcotics can be easily and quickly destroyed

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[25] United States v. Morales, 171 F.3d 978, 983 (5th Cir. 1999).

[26] United States v. Sangineto-Miranda, 859 F.2d 1501, 1511 (6th Cir. 1988)(citing Welsh, 466 U.S. at 749-50).

[27] Sangineto-Miranda, supra at 1511 n.6 (citing United States v. Socey, 846 F.2d 1439, 1444 n.5 (D.C.Cir. 1988); United States v. Aquino, 836 F.2d 1268, 1272 (10th Cir. 1988); United States v. Howard, 828 F.2d 552, 558 (9th Cir. 1987); and United States v. Cresta, 825 F.2d 538, 553 (1st Cir. 1987)).

[28] Sangineto-Miranda, supra at 1511 (citing Welsh, 466 U.S. at 753).

while a search is progressing.'"[29] Substantial evidence supported the trial court's finding that Officer Bowles' warrantless entry into Potter's apartment was justified by exigent circumstances; therefore, the trial court's findings are conclusive. The trial court did not err by denying Potter's motion to suppress the seized evidence.

Potter=s second argument is the trial court erred by finding that the warrantless search of his apartment fell within the consent exception to the Fourth Amendment because his consent was not voluntary and was further tainted by Officer Bowles's illegal entry.[30] The trial court found that Potter's consent to search his apartment was voluntarily given. After Officer Bowles entered Potter's apartment, he asked Potter where the marijuana was located. The record reflects that Officer Bowles indicated that he would call for the police K-9 unit if Potter did not disclose the location of the marijuana. Potter admitted that there was some marijuana located in a kitchen drawer.[31] After finding marijuana in the kitchen drawer, Officer

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[29] Sangineto-Miranda, 859 F.2d at 1511 (citing Socey, 846 F.2d at 1444-45 (quoting United States v. Johnson, 802 F.2d 1459, 1462 (D.C.Cir. 1986))).

[30] Potter devotes a large portion of his brief arguing whether his consent was tainted by the prior warrantless entry into his apartment. However, because the warrantless entry into Potters apartment was justified due to exigent circumstances, this argument is moot.

[31] This statement was properly suppressed in that it was obtained in violation of Miranda, 384 U.S. at 436.

Bowles asked for and received Potter's consent to search the apartment.

Potter argues that his consent was not voluntary in that it was the product of duress and threats by Officer Bowles. Potter claims that Officer Bowles informed him that the K-9 unit would be brought into his apartment and would paw and scratch his belongings if he did not consent. Potter claims that he then "reluctantly allowed the search to avoid any destruction of his personal items and apartment."

"Whether a consent to search was voluntarily given is a question of fact to be determined by a preponderance of the evidence from the totality of all the circumstances."[32] A search authorized by consent is completely valid.[33]

In its order denying the motion to suppress, the trial court stated:

> 1. . . . [C]onsent is one of the exceptions to the requirement for a warrant. United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). The test for determining if consent is constitutional is set out in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The question of voluntariness turns

[32] Talbott v. Commonwealth, Ky., 968 S.W.2d 76, 82 (1998)(citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973); and Cook, 826 S.W.2d at 329).

[33] Katz v. United States, 389 U.S. 347, 358 n.22, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

> on a careful scrutiny of all the surrounding circumstances in a specific case.
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> 2. Potter claims that he gave the police consent to search his apartment because he was told that, if he refused, the K-9 police dogs would be let loose in his apartment and that they would destroy his personal belongings. Officer Bowles specifically denied making this threatening statement to Potter.
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> 3. The Court is unconvinced that Potter was threatened into giving consent. Based on the totality of the circumstances, the Court concludes that Potter gave his consent for the police to search the apartment and that such consent was given freely and voluntarily.

The record shows that Officer Bowles testified that Potter was at first reluctant to consent to a search of his apartment. However, after he told Potter that a K-9 unit could be used to find drugs in the apartment, Potter nodded his head and consented. Officer Bowles also testified that he told Potter there was a drug dog that would paw and scratch his belongings and, rather than have that risk, Officer Bowles asked, "be cooperative, where is your marijuana?" Officer Bowles testified that he did not threaten Potter with the destruction of his property if he refused to consent to the search. Furthermore, Officer Young testified that he witnessed Potter tell Officer Bowles that Potter did not mind if the dog

came into the apartment as long as it did not mess up his apartment or personal belongings.

"Consent to search must be free, voluntary, and without coercion of any type."[34] Potter claims that he was coerced into giving consent because of the threat of his personal belongings being destroyed. Potter specifically argues that he was not free to leave because Officer Bowles handcuffed him and placed him in the prone position. Our Supreme Court has held that a consent to search form is not invalid simply because it is executed after a defendant is taken into custody.[35] Potter additionally argues that he was not advised of his right to refuse consent. This argument fails because the law does not require that a person be advised of his right to refuse consent to a search.[36] "[K]knowledge of a right to refuse is not a prerequisite of a voluntary consent."[37]

Potter relies on United States v. Kampbell,[38] where the defendant was investigated for theft and misappropriation of Postal Service property. Postal Service Inspectors requested

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[34] Middleton v. Commonwealth, Ky., 502 S.W.2d 517, 518 (1973).

[35] Talbott, 968 S.W.2d at 82; Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 221 (1976).

[36] Cook, 826 S.W.2d at 331 (citing Hohnke v. Commonwealth, Ky,. 451 S.W.2d 162 (1970)).

[37] Schneckloth, 412 U.S. at 234.

[38] 574 F.2d 962 (8th Cir. 1978).

consent to search Kampbell's home. When Kampbell refused to consent to the search, a Postal Service Inspector then explained to Kampbell the difference in the scope and allowable intrusion of his home under a search warrant conducted pursuant to a warrant and a consent search. The inspector told Kampbell that the power of the search warrant gave the inspector the power to tear the paneling off the walls, whereas a consent search only gave the inspector the authority to inspect those areas Kampbell authorized. The inspector additionally informed Kampbell that he could not ransack his home on a consent search, although he could with a search warrant.[39] Kampbell then consented to a search of his home.

The trial court found, and the United States Court of Appeals for the Eighth Circuit affirmed, that a threat to ransack Kampbell's house unless consent was given invalidated his consent. While Potter has alleged in the case sub judice that Officer Bowles informed him that the drug dog would paw and scratch at his personal belongings while searching for the drugs, the trial court specifically found that Potter's consent was voluntary and not the product of a threat. Since the trial court's findings were supported by substantial evidence, they

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[39] Id. at 963.

are conclusive. The trial court did not err by denying Potter's motion to suppress the seized evidence.

We will now address the additional issues raised by Hamilton. Hamilton claims that the trial court erred by refusing to sever the defendants= trials. RCr 9.16 provides, in part, as follows:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received. No reference to the motion shall be made during the trial.

AWhether to grant separate trials is primarily within the discretion of the trial judge.@[40] Furthermore, this Court Awill not reverse the decision to join trials unless there is an abuse of such discretion.@[41]

Both Hamilton and Potter were alleged to have participated in trafficking in the more than five pounds of marijuana that was seized from Potter's apartment. ATwo (2) or more defendants may be charged in the same indictment,

[40] Slone v. Commonwealth, Ky.App., 677 S.W.2d 894, 896 (1984).

[41] Id. at 896.

information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.@[42] AJoinder under RCr 6.20 is appropriate where, as here, the defendants >are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.=@[43]

Hamilton also argues that he should have been granted a separate trial from Potter because they had very antagonistic defenses. However, their defenses are antagonistic only in that each man claims it must have been the other man's marijuana because he was not aware of its presence in the apartment. Both Hamilton and Potter alleged that they did not know that large amounts of marijuana were located in the apartment.

Our Supreme Court has held that A[e]ven if the defendants attempt to cast blame on each other, severance is not required.@[44]

> Neither antagonistic defenses nor the fact that the evidence for or against one defendant incriminates the other amounts, by itself, to unfair prejudice . . . . That

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[42] RCr 6.20.

[43] Gabow v. Commonwealth, 34 S.W.3d 63, 70 (2000)(citing Jackson v. Commonwealth, Ky., 670 S.W.2d 828, 834 (1984), cert. denied, 469 U.S. 1111, 105 S.Ct. 791, 83 L.Ed.2d 784 (1985)).

[44] Gabow, supra at 71.

> different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than against a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together.[45]

Hamilton also claims that "[e]xtensive evidence inadmissible against Aaron Hamilton was introduced against Derek Potter." However, Hamilton fails to identify this inadmissible evidence. Hamilton further claims that a Aclose examination of the record herein demonstrates that [sic] the different degrees of culpability of these two defendants.@ This argument is totally meritless. Nothing in the record indicates any different degrees of culpability between Hamilton and Potter, and Hamilton fails to identify any such information. The trial court did not err by refusing to sever Hamilton=s trial from Potter=s trial.

Hamilton also claims that the trial court erred by refusing to grant him a mistrial when the Commonwealth inquired into Tyrone Maxwell's criminal record. During the Commonwealth's cross-examination of defense witness Maxwell, the prosecutor asked him to tell the jury about his criminal record. The trial court sustained Hamilton's objection and the

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[45] Gabow, 34 S.W.3d at 71(citing Ware v. Commonwealth, Ky., 537 S.W.2d 174, 177 (1976)).

Commonwealth asked no further questions concerning Maxwell's criminal charges.

The Commonwealth concedes that the prosecutor's question did not conform with the witness impeachment provisions of CR 43.07.[46] However, the Commonwealth argues that no reversible error occurred regarding the prosecutor's question and that the prosecutor's improper inquiry into Maxwell's criminal record only constitutes harmless error.

Hamilton apparently argues that the trial court should have granted a mistrial regarding the prosecutor's inquiry into Maxwell's criminal record. "A mistrial is appropriate only where the record reveals 'a manifest necessity for such action or an urgent or real necessity.'"[47] Hamilton claims that this "attack by the Commonwealth upon the witness, Tyrone Maxwell, is in violation of the Kentucky Rules of Evidence" and that "the prosecutor asked Tyrone Maxwell why he was a drug trafficker." First, the alleged "attack" upon Maxwell was a single question inquiring into his criminal record. Second, Hamilton fails to show where the prosecutor referred to Maxwell as a drug

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[46] CR 43.07 provides that "[a] witness may be impeached by any party . . . but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or a record of a judgment, that he has been convicted of a felony."

[47] Bray v. Commonwealth, Ky., 68 S.W.3d 375, 383 (2002)(citing Clay v. Commonwealth, Ky.App., 867 S.W.2d 200, 204 (1993); and Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985)).

trafficker. The record shows that the only reference to Maxwell's criminal past was when the prosecutor asked him to tell the jury about his criminal record. As previously stated, the trial court sustained Hamilton's objection to the question and the prosecutor did not refer again to Maxwell's criminal record. Contrary to Hamilton's assertion, the prosecutor did not "introduce[ ] a marijuana arrest . . . clearly in violation of case law and of rules."

Although Hamilton argues that a mistrial should have been granted, the record discloses that he failed to request a mistrial or an admonition following the bench conference.[48] Thus, the "trial court did not commit any error which, under RCr 9.22, was preserved for appellate review."[49] Hamilton did object to the question; however, this objection was sustained. Furthermore, any potential prejudice to Hamilton regarding this question was certainly minimal because the jury heard Maxwell testify to his and Hamilton's marijuana consumption. Since other evidence of Maxwell's use of marijuana was presented, any error at most would be harmless.[50] There certainly was no manifest necessity for a mistrial.

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[48] Taylor v. Commonwealth, Ky., 449 S.W.2d 208, 209 (1969).

[49] Id. at 209.

[50] Cormney v. Commonwealth, Ky.App., 943 S.W.2d 629, 634 (1996)(citing Walden v. Commonwealth, Ky., 805 S.W.2d 102 (1991)).

Hamilton also argues that a mistrial was warranted when the prosecutor asked Hamilton during cross-examination if he knew that Brian Heyward had been convicted of trafficking in marijuana. Heyward and Hamilton had played video games together at a fraternity house during the evening prior to Hamilton's arrest. Hamilton argues that the prosecutor's reference to Heyward as a known drug trafficker and the fact that they played video games together was inadmissible and prejudicial and required a mistrial, since Heyward's drug arrest occurred many months after Hamilton's arrest for trafficking in marijuana.

The trial court properly denied Hamilton's motion for a mistrial. Although the prosecutor inquired as to whether Hamilton knew Heyward to be a drug trafficker, she refrained from asking any further questions when cross-examination resumed following the objection. Further, both Hamilton's mother and father had testified that their son did not have a reputation for being a marijuana trafficker. This testimony as to Hamilton's character served to open the door for further inquiries about his character.[51]

As to Hamilton's claim of prosecutorial misconduct, this Court "must focus on the overall fairness of the trial, and

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[51] Commonwealth v. Higgs, Ky., 59 S.W.3d 886, 894-95 (2001).

not the culpability of the prosecutor."[52] Hamilton received a fair trial. There was no manifest need for a mistrial and there was no error.

Hamilton also argues that the trial court erred by refusing to suppress the evidence seized from Potter's apartment, and his own person and rental car. Hamilton's arguments regarding suppression of the evidence seized in Potter's apartment have been previously addressed in this Opinion and will not be revisited. We also affirm the trial court's denial of Hamilton's motion to suppress.

While searching Hamilton, the police found a small bag of marijuana. Hamilton claims that although he consented to the search, his consent was the result of duress and coercion. Hamilton alleges that consent was obtained because Officer Bowles put a gun to his head. The trial court found that there was no evidence that Officer Bowles drew his weapon or threatened Hamilton. The trial court's factual findings were supported by substantial evidence and are therefore conclusive.[53]

Hamilton argues that the trial court erred by refusing to suppress the evidence seized from the rental car because the warrantless search was not supported by both probable cause and

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[52] Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411-12 (1987)(citing Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)).

[53] RCr 9.78.

exigent circumstances.[54] Officer Bowles testified from past experience that masking agents, such as detergent found with the marijuana in the apartment, are often used to transport marijuana by automobile, and the drug dog alerted on the car. Therefore, there was probable cause to believe that Hamilton's rental car had been used to transport marijuana. The officers further knew that Hamilton had not driven to Bowling Green alone; thus, they had reason to be concerned that there may have been another key to the rental car.[55] Accordingly, the officers were concerned that the automobile might be removed from the jurisdiction or that evidence might be removed from the automobile. The trial court properly found that probable cause and exigent circumstances justified a warrantless search of the automobile. The trial court's factual findings were supported by substantial evidence and are therefore conclusive.[56]

Hamilton also argues that the trial court erred by refusing to grant a mistrial or severance to him after Potter intentionally violated the trial court's order on the motion <u>in limine</u> regarding Hamilton's ability to post bond. Prior to trial, Hamilton moved the trial court to exclude evidence that

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[54] <u>Coolidge</u>, 403 U.S. at 443.

[55] Maxwell accompanied Hamilton on the trip from Indianapolis to Bowling Green.

[56] RCr 9.78.

he posted a $20,000.00 cash bond and got out of jail within five days, while Potter remained in jail for 59 days until the Commonwealth agreed to a bond of $20,000.00 ten percent. The trial court granted Hamilton's motion with regard to the Commonwealth's reference to the amount of bond set and the amount of bond posted.

Hamilton argues that the trial court's order on this motion in limine was violated when Potter testified that he remained in jail for 59 days because he, unlike Hamilton, did not have the money to post bond. The record indicates that during direct examination, Potter testified that Hamilton posted bond and was released, although Potter stayed in jail because he did not have $25,000.00 to post bond.[57] After this testimony was elicited, the record reflects that Hamilton's counsel asked to approach the bench and that during this bench conference, Hamilton's counsel requested a mistrial for violation of the trial court's order on the motion in limine.

It is apparent from the record that Potter's counsel did violate the trial court's order. However, Hamilton fails to explain how this testimony prejudiced his substantial rights. During the bench conference, Potter's attorney informed the trial judge that the only reason he questioned Potter about the

[57] The record is unclear if Hamilton's $20,000.00 bond was changed to $25,000.00.

bond issue was to learn how long Potter stayed in jail. Potter's counsel additionally claimed that Potter's referral to Hamilton's $25,000.00 bond was non-responsive, and that his intent was to question Potter concerning events that occurred after Hamilton's release but before Potter's release. Apparently, Potter's counsel elicited this testimony to demonstrate that Hamilton told Potter that he would "take care of it."[58]

Hamilton has failed to demonstrate any prejudice which resulted from this exchange. "Error without prejudice is disregarded."[59] Although Hamilton's counsel violated the trial court's order on the motion in limine, there is no substantial possibility that the trial result would have been any different absent such testimony by Potter. There was overwhelming evidence of Hamilton's guilt. There was no manifest necessity for a mistrial, and the trial court did not err.

Hamilton also claims that the trial court erred by refusing to grant a mistrial or severance after the Commonwealth intentionally violated the trial court's order on the motion in limine regarding his silence after being arrested. Hamilton

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[58] Hamilton's alleged statement that he would "take care of it" supposedly refers to his and Potter's legal troubles involving the criminal charges at issue in this appeal.

[59] Commonwealth v. Donovan, Ky., 610 S.W.2d 601, 602 (1980)(citing RCr 9.24).

alleges that "[p]rior to trial and pursuant to Motions, the Court ruled in limine that [he] had elected to exercise his Fifth Amendment right of silence and not give a statement to the police after he was arrested." During direct examination, the following colloquy took place:

> Prosecutor: Did you hear Derek Potter make any statements?
>
> Officer Young: Yes, he had been mirandized and we were down at the Warren County Regional Jail when he basically just stated that he had done a favor for a friend and that's all he would say.
>
> Prosecutor: Did you attempt to question him anymore about that?
>
> Officer Young: No.
>
> Prosecutor: Ok. At the scene, . . .
>
> Officer Young: Neither Mr. Hamilton nor Mr. Potter were very forthcoming. I mean, that's about all that they said.
>
> Prosecutor. Ok.
>
> Hamilton's Atty: Objection, Your Honor. May we approach?

At the bench conference, Hamilton's counsel moved for a mistrial, claiming that the trial court's order on the motion in limine had been violated. The trial court denied the motion.

The record indicates that the prosecutor did not elicit any testimony about Hamilton's post-arrest silence. After reviewing the exchange which occurred between the Commonwealth and Officer Young, this Court finds that Officer Young volunteered the information regarding Hamilton's post-arrest silence. After asking Officer Young if he attempted to question Potter any further after his arrest and Officer Young replied "no", the videotape record clearly demonstrates that the prosecutor was asking another question. However, before she could complete her question, Officer Young interrupted her and volunteered the information that "neither Mr. Hamilton nor Mr. Potter were very forthcoming."

The United States Supreme Court has held that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[60] Our Supreme Court has stated:

> Doyle and subsequent cases make it clear that not every isolated instance referring to post-arrest silence will be reversible error. It is only reversible error where post-arrest silence is deliberately used to impeach an explanation subsequently offered at trial or where there is a similar reason to believe the defendant has been prejudiced by reference to the exercise of his constitutional right. The usual situation

[60] Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

> where reversal occurs is where the prosecutor has repeated and emphasized post-arrest silence as a prosecutorial tool.[61]

In the case sub judice, the prosecutor did not deliberately use this information to impeach Hamilton. Furthermore, she did not repeatedly emphasize Hamilton's post-conviction silence as a prosecutorial tool. In fact, she did not even elicit such testimony, as Office Young blurted it out when he interrupted her while she was asking another question. The trial court properly denied Hamilton's motion for a mistrial because there was no manifest necessity for a mistrial.

Hamilton also claims that the trial court erred by admitting expert witness testimony that should not have been allowed into evidence. Prior to trial, Hamilton moved to exclude testimony by police officers that detergent is often used as a masking agent to conceal the odor of marijuana when being transported by automobile. The trial court properly denied this motion, ruling that such testimony would be admissible as long as there is a proper foundation. The trial court properly ruled that police officers can testify as expert witnesses regarding aspects of illegal drug trafficking.[62]

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[61] Wallen v. Commonwealth, Ky., 657 S.W.2d 232, 233 (1983)(citing United States v. Davis, 546 F.2d 583 (5th Cir. 1977)).

[62] Sargent v. Commonwealth, Ky., 813 S.W.2d 801, 802 (1991).

Nonetheless, Hamilton attempts to extend this pre-trial motion to include a question the prosecutor asked Officer Young. Hamilton alleges that the prosecutor asked Officer Young the following question: "Did you feel that Tyrone Maxwell was guilty?" Hamilton's alleged objection to this question was overruled.[63] On cross-examination, however, the record reflects that Potter's counsel questioned Officer Young about his decision to release Maxwell.[64] The record reflects that the following transpired during cross-examination:

Potter's Atty: You certainly couldn't rule out that he (Tyrone Maxwell) participated somehow in this situation?

Officer Young: If you're asking me if I feel like he was involved in some way, yes I feel like he was involved.

Hamilton's Atty: Objection, Your Honor.

Trial Judge: Overruled.

Potter's Atty: You just didn't feel like you had sufficient proof?

Officer Young: Correct, sir.

[63] Hamilton fails to cite where this exchange occurs on the videotape record. However, upon review of the record, this Court has located that portion of the prosecutor's direct examination of Officer Young where the prosecutor questioned Officer Young's decision not to arrest Maxwell.

[64] The Commonwealth correctly cites the location of this exchange on the videotape record.

Officer Young offered no expert testimony regarding his decision not to arrest Maxwell. Officer Young testified that he decided not to charge Maxwell because he did not have sufficient proof that he was involved in trafficking marijuana. Police officers are regularly required to decide whether or not a particular individual should be charged with a crime. These decisions are routinely made, often under demanding conditions. There was no error in admitting this testimony.

Hamilton also claims that the Commonwealth's closing argument exceeded the boundaries of a permissible closing argument. Hamilton complains about several different statements the Commonwealth made during its closing argument concerning both defendants, as well as Maxwell, having lied. The record clearly reflects that Hamilton did not object to these statements during the Commonwealth's closing argument. "Unpreserved claims of error cannot be resuscitated by labeling them cumulatively as 'prosecutorial misconduct.'"[65]

However, even if the argument were not barred for lack of preservation, it would nevertheless fail. During his closing argument, Hamilton's counsel accused all involved, except his client, of lying. The prosecutor's statements during her closing argument were an entirely proper response to Hamilton's

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[65] Young v. Commonwealth, Ky., 50 S.W.3d 148, 172 (2001)(citing Davis v. Commonwealth, Ky., 967 S.W.2d 574, 579 (1998)).

claims during his closing argument. The prosecutor's statement during her closing argument "were provoked by and made in response to previous statement's of [Hamilton's] attorney before the jury."[66] "Great leeway is allowed to both counsel in a closing argument. It is just that—an argument" [emphases original].[67] The prosecutor's closing argument was entirely proper and there was no error.

Hamilton claims that the trial court erred by denying his motion for a new trial based upon alleged exculpatory evidence contained on the police department's 911 audiotape which could not be located. Hamilton argues that the 911 audiotape, recorded on the night of his arrest at Potter's apartment, contained exculpatory evidence. Although the 911 audiotape was destroyed according to routine procedure by the Bowling Green Police Department and Potter's counsel misplaced the copy he obtained, Hamilton was nevertheless provided a typed transcript of the audiotape. In fact, Hamilton's counsel used the 911 audiotape transcript to cross-examine Officer Young during the trial. Therefore, the contents of that 911 audiotape containing the alleged exculpatory evidence was available to,

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[66] Montgomery v. Commonwealth, Ky., 346 S.W.2d 479, 482 (1961)(citing Rogers v. Commonwealth, 161 Ky. 754, 171 S.W. 464 (1914); and Brooks v. Commonwealth, 281 Ky. 415, 136 S.W.2d 552 (1940)).

[67] Slaughter, 744 S.W.2d at 412 (citing Hunt v. Commonwealth, Ky., 466 S.W.2d 957 (1971); Houston v. Commonwealth, Ky.App., 641 S.W.2d 42 (1982); and Johnson v. Commonwealth, Ky., 302 S.W.2d 585 (1957)).

and used by, Hamilton's counsel at trial. Additionally, after reviewing the 911 audiotape transcript, this Court in unconvinced that it contains exculpatory evidence. There is no indication that it provides Hamilton with any exculpation. The trial court properly denied Hamilton's motion for a new trial.

For the foregoing reasons, the Warren Circuit Court's judgments of conviction and sentences for Potter and Hamilton are affirmed.

ALL CONCUR.

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