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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001800-MR

WILLIAM DOUGLAS LUDWIG, JR. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
INDICTMENT NO. 01-CR-000908

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION

AFFIRMING IN PART, REVERSING IN PART

AND REMANDING

** ** ** ** **

BEFORE: BAKER and SCHRODER, Judges; HUDDLESTON, Senior Judge.[1]

HUDDLESTON, Senior Judge: William Douglas Ludwig was charged in an indictment with the offenses of burglary in the third degree,[2]

[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 Ky. Rev. Stat. (KRS) 21.580.

[2] KRS 502.020.

receiving stolen property valued at over $300.00,[3] possession of a controlled substance (cocaine) in the first degree,[4] use or possession of drug paraphernalia,[5] and being a first-degree persistent felony offender.[6] These charges stemmed from Ludwig's conduct on February 7, 2001, when he allegedly participated in the burglary of a carpet store in Louisville, Kentucky, and purchased cocaine with the proceeds from the burglary.

On February 7, 2001, an anonymous person called the Louisville Police Department concerning a break-in at Huber's Linoleum and Carpet Co., located at the corner of Shelby and Caldwell Streets. The caller told the dispatcher that several men had broken out a front window and dragged a safe from the carpet store. The caller further informed the dispatcher that the dragged safe had left marks in the sidewalk. Finally, the tipster advised that the men involved in the break-in stated that they were going to return to the carpet store and take more items. Based on this information, officers from the Louisville Police Department were dispatched and arrived at the scene at 11:26 p.m.

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[3] KRS 514.110.

[4] KRS 218A.1415.

[5] KRS 218A.500.

[6] KRS 532.080.

During their investigation, the officers observed what appeared to be drag marks leading from the front of the carpet store to a residence at 728 East Caldwell Street. The officers followed these marks to the side door of the residence. After arriving at the side door, the officers heard loud banging and pounding noises coming from inside of the house. Believing that the suspects were inside the residence trying to break into the safe and destroy evidence, the officers contacted their supervisor and requested instructions. The supervisor ordered the officers to enter the house even though they had not obtained a search warrant. The officers then forced their way into the residence while Ludwig and James Horton were breaking the safe open with heavy tools. The officers secured the scene and arrested Ludwig, Horton and Carol Phillips.[7]

After he was indicted, Ludwig moved to suppress the evidence seized during the warrantless entry of his house. At a hearing on Ludwig's motion to suppress, Lieutenant Michael Brandon of the Louisville Police Department's Stolen Property Arrest and Recovery Squad[8] testified that he arrived on the scene after the patrol officers had entered Ludwig's residence. Upon his arrival, Lt. Brandon was advised of the events that caused

[7] Carol Phillips was Ludwig's girlfriend and resided in Ludwig's residence at the time of these events.

[8] The Stolen Property Arrest and Recovery Squad is commonly referred to as the SPARS unit.

the patrol officers to enter the residence without a search warrant. Based upon his observations, Lt. Brandon applied for a warrant to search the remainder of Ludwig's residence. The warrant listed those items discovered during the initial entry and provided information concerning other burglaries that had recently occurred in the area. Despite the fact that the affidavit supporting the search warrant contained erroneous information about the anonymous call,[9] a district judge signed the search warrant approximately four hours later. The police then executed the search warrant and recovered a cash register that had been stolen in a previous burglary, shoes,[10] tools and various items of drug paraphernalia, mainly crack pipes, from Ludwig's residence.[11]

After entering into a plea agreement with the Commonwealth,[12] Horton testified at the suppression hearing. He

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[9] Lieutenant Brandon's affidavit stated that the caller advised "that several subjects were dragging a safe from the business into the addressed named in the affidavit." An audiotape of the 911 call played during the suppression hearing reveals that the caller never provided the police with information that the safe had been dragged to Ludwig's house or provided an address for Ludwig's residence.

[10] The police seized the shoes in order to analyze them against footprints found at the scene of another burglary.

[11] The police also confirmed during the execution of the search warrant that the safe was taken from the carpet store. Due to its size and weight, the police did not remove the safe from the residence. The location of the safe was not known at the time of the suppression hearing.

[12] Horton entered a guilty plea to the charges of third-degree burglary, receiving stolen property over $300.00, illegal possession of a controlled substance (cocaine), illegal possession of drug paraphernalia and an amended charge of being a second-degree persistent felony offender. Horton also

asserted that Ludwig and two black males broke the front window of the carpet store and dragged a safe outside. While Horton did not enter the carpet store, he helped Ludwig and the two black men drag the safe from the carpet store to Ludwig's house. Horton also admitted that he assisted Ludwig by using various tools to break the safe open. Using a sledgehammer, Ludwig finally broke the bottom of the safe open and found $38.00 cash inside it. Using the money obtained from the safe, Ludwig bought a "$40.00 piece" of cocaine[13] and split it with Horton and Phillips. Horton claimed that the police kicked down the door and entered the residence while they were smoking the cocaine. Horton insisted that the police did not observe the opening of the safe because Ludwig had already broken the safe open, removed the money and obtained the cocaine prior to their arrival.

After considering the evidence introduced during the suppression hearing, the circuit court found that the police entered Ludwig's home without securing a search warrant based upon a reasonable belief that evidence from the carpet store burglary was being destroyed. Further, the court found that,

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agreed to provide truthful testimony against Ludwig. In exchange for his guilty plea, Horton was sentenced to five years in prison.

[13] Horton provides two different accounts concerning Ludwig's purchase of the cocaine. At the suppression hearing, Horton testified that an unknown person delivered the cocaine to them. At trial, however, Horton stated that Ludwig left the house, made a telephone call and returned with the cocaine.

even if the police had obtained a warrant prior to entering Ludwig's home, they would have inevitably discovered the seized evidence. Accordingly, the court denied Ludwig's motion to suppress the evidence seized by the police because of the warrantless entry of his residence.

On July 17, 2002, a petit jury, based upon testimony by Lt. Brandon, Horton and Phillips,[14] found Ludwig guilty of burglary in the third degree, receiving stolen property, possession of a controlled substance (cocaine) in the first degree and use of drug paraphernalia. The jury also found Ludwig to be a persistent felony offender in the first degree. The jury recommended that Ludwig receive a total sentence of fifteen years' imprisonment. This appeal followed.

Ludwig contends on appeal that the circuit court erred when it refused to suppress the evidence seized following the warrantless entry and search of his residence. Ludwig submits that the warrantless entry of his residence by the police was not justified by probable cause or by any exception to the warrantless search rules. Accordingly, Ludwig believes that the seizure of the evidence following this warrantless entry

[14] Phillips testified that she observed Horton and Ludwig break open the safe and confirmed that Ludwig obtained cocaine from the money found in the safe. Phillips also admitted to smoking this cocaine with Ludwig and Horton prior to their arrest. Prior to Ludwig's trial, Phillips entered into a plea agreement with the Commonwealth whereby she entered a plea of guilty to the charges of possession of a controlled substance (cocaine) and possession of drug paraphernalia. In exchange for her guilty plea, Phillips received a total prison sentence of two years.

violated the Fourth Amendment to the United States Constitution, as well as Section 10 of the Kentucky Constitution.

In reviewing a cicuit court's decision on a motion to suppress, this Court is required to first determine whether the court's findings of fact are supported by substantial evidence.[15] If those findings are supported by substantial evidence, then they are conclusive.[16] "Based on those findings of fact, we must then conduct a de novo review of the court's application of the law to those facts to determine whether its decision is correct as a matter of law."[17]

The Fourth Amendment to the United States Constitution provides that:

> The 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.

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

[16] Ky. R. Crim. Proc. (RCr) 9.78.

[17] 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).

"The Fourteenth Amendment incorporates the Fourth Amendment, prohibiting unreasonable searches and seizures by the states."[18] The Kentucky Constitution accords the same rights.[19]

A warrant is ordinarily required to enter a person's home. The United States Supreme Court has held that "the Fourth Amendment has drawn a firm line at the entrance to the house," adding that "[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[20] "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable."[21] Furthermore, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[22] Nevertheless, there are exceptions to this warrant requirement, including "hot pursuit of a fleeing felon, or imminent destruction of evidence, . . . or the need to

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[18] 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)).

[19] Ky. Const. § 10.

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

[21] 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).

[22] 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).

prevent a suspect's escape, or the risk of danger to the police or to the other persons inside or outside the dwelling."[23]

In the case before us, Lt. Brandon testified at the suppression hearing that, from hearing loud banging and pounding noises coming from inside the house where the drag marks stopped, the patrol officers believed that exigent circumstances existed for entering the house due to the possible destruction of the safe and the removal of its contents. Ludwig argues that exigent circumstances did not exist, and that the warrantless entry into and subsequent search of his apartment was not justified.

As a general rule, exigent circumstances are said to exist when police officers face circumstances requiring them to act not only for their own protection, but also for the protection of the lives and property or others.[24] The U.S. Supreme Court further defined this rule by proclaiming that "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation."[25] Finally, this Court has recognized "that a

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

[24] Styles v. Commonwealth, Ky., 507 S.W.2d 487 (1973); Taylor v. Commonwealth, Ky. App., 577 S.W.2d 46 (1979).

[25] Roaden v. Kentucky, 413 U.S. 496, 505, 93 S.Ct. 2796, 2802, 37 L.Ed.2d 757, 765 (1973).

warrantless search is permissible where 'evidence may be destroyed.'"[26]

Here, the record reveals that the police were dispatched to the carpet store after being alerted by an anonymous caller that a burglary was in progress. The caller informed the police that several men had removed a safe from the store and were dragging it down the street. The caller also overheard the perpetrators declare their intention to return to the carpet store to obtain more items. Upon being dispatched to the scene, the patrol officers observed a broken window in the front of the business, as well as drag marks in front of the store. The police followed the drag marks to Ludwig's residence. At this point, according to Lt. Brandon, the patrol officers heard loud banging and pounding noises, indicating that evidence or property stolen from the carpet store was being destroyed inside the residence. Upon hearing their noises, a decision was made to enter the residence based upon the belief that evidence within the safe could be destroyed or converted for other use. Despite Horton's testimony that the safe was already opened prior to the warrantless entry,[27] substantial evidence supported the circuit court's finding that the

[26] Cormney v. Commonwealth, Ky. App., 943 S.W.2d 629, 633 (1997), quoting Taylor v. Commonwealth, Ky. App., 577 S.W.2d 46 (1979).

[27] Horton admitted that he was under the influence of cocaine during the occurrence of these events.

warrantless entry into Ludwig's residence was justified by exigent circumstances. Therefore, court's findings are conclusive, and it did not err by denying Ludwig's motion to suppress the seized evidence.

There is another reason why the motion to suppress the evidence seized from Ludwig's house was properly denied. In Nix v. Williams,[28] the U.S. Supreme Court adopted the "inevitable discovery rule" to permit admission of evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means.[29] Noting that the rationale behind excluding the "fruit of the poisonous tree"[30] was that the prosecution should not be put in a better position than it would have been if the illegality had not transpired, the Court concluded in Nix that, conversely, the prosecution should not be put in a worse position than if no police error or misconduct had occurred.[31] In Nix, the victim's body was initially discovered as a result of an unlawfully obtained statement from the defendant; however, the body was found within an area already being searched by two hundred volunteers who inevitably would have discovered it "in

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[28] 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

[29] Id. at 444, 104 S.Ct. at 2509.

[30] Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963).

[31] Nix, supra, at 443, 104 S.Ct. at 2508-09.

short order."[32] The rationale behind the inevitable discovery rule is that there exists no "'constitutional right' to destroy evidence."[33]

In this case, Lt. Brandon testified that he applied for the warrant after seeing the drag marks leading from the carpet store to the house and after examining the damage at the business. Lt. Brandon further stated that the affidavit in support of the search warrant was based on what the patrol officers discovered at the house. Lt. Brandon also specifically identified the facts as they existed to the patrol officers before they decided to enter the residence without a search warrant. Thus, we believe that the record supports the circuit court's conclusion that the officers had probable cause to obtain a search warrant prior to entering the house and after obtaining that search warrant, the police would have inevitably recovered the evidence seized during the warrantless entry. Thus, there was no error.

Ludwig next contends that the circuit court erred by denying his motion for a directed verdict of acquittal with

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[32] Id. at 435-37, 104 S.Ct. at 2504-06.

[33] Segura v. United States, 468 U.S. 796, 816, 104 S.Ct. 3380, 3391, 82 L.Ed.2d 599 (1984) (applying the conceptually similar "independent source rule." At this point, we must point out that the trial court herein also referenced the "independent source rule" to justify the search of Ludwig's residence. However, since we have found that the warrantless entry of Ludwig's home was justified by two exceptions to the search warrant requirement, we need not address the arguments presented to us by both parties concerning the "independent source rule").

regard to the charge of possession of a controlled substance. Ludwig argues that the Commonwealth presented insufficient evidence that he possessed cocaine at the time of his arrest because it failed to introduce laboratory results indicating that any substance found at the scene was, in fact, cocaine. The Commonwealth contends that it presented sufficient evidence that Ludwig possessed cocaine prior to his arrest through the testimony of Horton and Phillips, both of whom acknowledged smoking cocaine with Ludwig on February 7, 2001.

A directed verdict is warranted only where the Commonwealth's evidence fails to establish guilt.[34] If under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal.[35] A defendant is not entitled to a directed verdict of acquittal on insufficient evidence if it would not be unreasonable for a jury to find him guilty.[36]

In this case Horton and Phillips both testified that they were drug addicts and were familiar with crack cocaine. Both witnesses acknowledged that Ludwig purchased a "$40 piece" of crack with the money he found in the safe. Horton and

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[34] Butler v. Commonwealth, Ky., 516 S.W.2d 326 (1974).

[35] Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Trowel v. Commonwealth, Ky., 550 S.W.2d 530 (1977).

[36] Yarnell v. Commonwealth, Ky., 833 S.W.2d 834 (1992); Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983).

Phillips further noted that, after Ludwig purchased the crack cocaine, he split the drugs into three portion and shared it with them. Finally, Horton and Phillips declared that, based upon their prior experience in using cocaine, the substance they both smoked with Ludwig on February 7, 2001 was, in fact, cocaine.

In Kentucky, "[i]t is unnecessary for a conviction of trafficking in a controlled substance that the controlled substance be seized by the police or that it be introduced at trial. Conviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt."[37] In prosecutions for drug offenses, the identity of the substance is, of course, an element of the offense. While it is more common for the Commonwealth to introduce expert testimony concerning the identity of the drug, Kentucky's highest court has found that a drug addict should be a pretty-well qualified expert on the subject of illegal drugs and can testify as to the identity of the drug "as far as [he knew]."[38] Since two admitted cocaine users provided testimony

[37] Graves v. Commonwealth, Ky., 17 S.W.3d 858, 862 (2000), citing Howard v. Commonwealth, Ky. App., 787 S.W.2d 264 (1989).

[38] Edwards v. Commonwealth, Ky., 489 S.W.2d 23, 25 (1972). In United States v. Wright, 16 F.3d 1429, 1440 (1994), the Sixth Circuit Court of Appeals held that a crack cocaine dealer and user can testify that a substance is, in fact, crack cocaine.

that Ludwig possessed, provided and shared crack cocaine with them prior to the warrantless entry, it was not clearly unreasonable for the jury to find Ludwig guilty of illegally possessing cocaine. Accordingly, there was no error in the circuit court's denial of Ludwig's motion for a directed verdict.

Finally, we turn to Ludwig's argument that the Commonwealth was permitted to introduce inadmissible evidence during the penalty phase of his trial. Commonwealth's exhibits 1 through 7 were placed before the jury pursuant to our truth-in-sentencing statute.[39] Each of these exhibits contained an indictment, a form entitled "Commonwealth's Offer on a Plea of Guilty," a motion to enter a guilty plea and a judgment of conviction. The Commonwealth's witness did not read the indictments to the jury; she only read the charges for which Ludwig was actually convicted. Yet, the indictment and plea agreement materials were admitted into evidence and the jury had access to them during its deliberations. Five of the seven indictments charged Ludwig with being a first-degree or second-degree persistent felony offender[40] and listed predicate felony offenses.

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[39] Kentucky's truth-in-sentencing statute, KRS 532.055, permits the prosecution to introduce evidence of a convicted defendant's prior criminal record to assist the jury in determining an appropriate sentence.

[40] According to these exhibits, Ludwig has never been convicted of being a persistent felony offender.

Ludwig's trial counsel failed to object to the admission of this evidence. Nevertheless, Ludwig has asked us to review the admission of this evidence for palpable error.[41] "A palpable error is one that 'affects the substantial rights of a party' and will result in 'manifest injustice' if not considered by the court . . . ."[42] While we have upheld Ludwig's convictions for third-degree burglary, possession of a controlled substance and use of drug paraphernalia, the jury also found Ludwig to be a persistent felony offender and recommended an enhanced prison sentence of fifteen years' imprisonment. If the jury had access to improperly admitted evidence during the persistent felony offender and sentencing phase of the trial, Ludwig's rights were substantially affected. Consequently, we will review this argument under the palpable error standard.

KRS 532.055(2)(a) provides that, during the sentencing phase of a felony trial, the Commonwealth can inform the jury of the defendant's prior misdemeanor and felony convictions and the

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[41] RCr 10.26 provides that: "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." While we agree with Commonwealth that there are serious procedural questions whether Sykes can utilize RCr 10.26 to raise a collateral attack on a twenty-two year old judgment, we need not address these issues because the appeal can be resolved on the merits. See generally Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983)(outlining procedure for appeal of criminal judgment).

[42] Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836 (2003).

nature of any offenses of which he has previously been convicted. The Kentucky Supreme Court, in Robinson v. Commonwealth[43], ruled that KRS 532.055 "permits the introduction of prior convictions of the defendant, not prior charges subsequently dismissed."[44] Here, each unredacted indictment that the jury was allowed to view included a charge of being a persistent felony offender in the first or second degree against Ludwig. Ludwig, however, was never convicted of these charges. The introduction of these unredacted indictments violates the principle enunciated in Robinson. Therefore, we must reverse and remand for the circuit court to conduct a new sentencing phase.

For the foregoing reasons, the judgment is affirmed as to Ludwig's convictions for burglary in the third degree, possession of a controlled substance and use of drug paraphernalia. However, we reverse and remand for a new determination of his status as a persistent felony offender and sentencing phase.

ALL CONCUR.

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[43] Id. at 854.
[44] Ky., 926 S.W.2d 853 (1996).

BRIEF FOR APPELLANT:

Elizabeth B. McMahon
Frank W. Heft, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky