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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002293-MR

ROBERT K. BURDEN — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 02-CR-00114

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: In September of 2003 Robert K. Burden entered a conditional guilty plea to the charges of manufacturing methamphetamine and trafficking in a controlled substance in the first degree, reserving his right to appeal the Grayson Circuit Court's denial of his motion to suppress. Burden contends that law enforcement officers lacked probable cause to enter his property and argues that the officer's search and seizure of his garbage was unconstitutional. Burden continues by arguing that

the search warrant issued was invalid because its signer lacked authority. We disagree with Burden's contentions and affirm the circuit court ruling.

On July 23, 2002, Detective Willen received a memo describing the location of Burden's residence, along with information that an anonymous tip had been received indicating that Burden was manufacturing methamphetamine at his home. Deputy sheriffs approached Burden's residence to speak with him regarding the allegation, but they did not find him at home. According to the circuit court:

> As the officers were backing out of Defendant's driveway onto a public road, Detective Willen testified he saw a can of some sort sitting on top of a garbage bag in an area next to the road. . . . Detective Willen's testimony at the suppression hearing was that the can he saw was an ether can. Ether is used as a precursor in methamphetamine production. Willen previously testified he saw a Coleman type fuel canister on top of the garbage. This also can constitute a precursor to illegal drug manufacture. Willen proceeded to look in the garbage where ether and/or Coleman fuel canisters were observed. The officers seized the trash bags without a warrant.

A warrant to search Burden's residence was then obtained from the trial commissioner for Breckenridge County, who had been appointed by the chief district judge to serve as the temporary trial commissioner for Grayson and Meade Counties, from July 23

through July 27, 2002, due to the unavailability of the district judges in those counties.

RCr 9.78 sets out the procedure for conducting a suppression hearing. The appellate court's standard of review of the trial court's determination is described in *Commonwealth v. Neal*, Ky. App., 84 S.W.3d 920, 923 (2002):

> [W]e first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. 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.

(Footnotes omitted). If neither of these reviews shows error on the part of the trial court, the court's decision must stand. Since no such errors exist, we affirm the circuit court's decision to deny Burden's motion to suppress.

Burden first contends that an anonymous tip did not give officers probable cause to conduct a search on his property. However, Detective Willen testified that officers approached Burden's home in order to conduct a "knock and talk." Such an entry onto Burden's property following a citizen's complaint of alleged drug manufacturing did not constitute a search or a violation of Burden's rights. In *Cloar v. Commonwealth*, Ky. App., 679 S.W.2d 827, 831 (1984), the court held "that a police officer in the furtherance of a legitimate

criminal investigation has a legal right to enter those parts of a private residential property which are impliedly open to public use." However, the court limited the permissible scope of entry to those areas that "are necessary to enable the officer to find and talk to the occupants of the residence." *Id.* at 831.

Although Burden relies on *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), in arguing that an anonymous tip did not constitute a reliable source justifying a *Terry* stop, *J.L.* is not pertinent since Burden was not subjected to a *Terry* stop. Instead, officers simply approached his residence to talk with him. Further, for the reasons stated below, the subsequent discoveries made by the officers when leaving the premises after their lawful entry thereon, did not amount to an illegal search and seizure.

Burden next contends that the warrantless search of his garbage was illegal because it lacked probable cause. He further contends that the search did not fall within the plain view doctrine because officers had no right to be in the vicinity of the garbage. However, as noted above, the officers did not violate Burden's rights by entering his property. In any event, as noted by the trial court, the garbage had been set by the side of the road for pickup, and therefore was not entitled to Fourth Amendment protection. A similar situation

was addressed in *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), after garbage collectors were asked by law enforcement officials to turn over the garbage collected in front of a particular house. The Court concluded that "respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." 108 S.Ct. at 1628-29 (footnotes omitted).

Contrary to Burden's contention, his garbage was not found within his home's curtilage as it was not contained within "[t]he land or yard adjoining a house, usu[ally] within an enclosure." Black's Law Dictionary (8th ed. 2004). Instead, the garbage receptacle and garbage bags were placed some thirty-five to forty feet from the house, within three feet of the public roadway. The trial court noted:

> The area where Detective Willen testified he found the garbage bags is one society would acknowledge being reasonably accessible to the public. After all, the bags were asserted to be on a public road right-of-way. Even if they were not on the right-of-way, the receptacle they were in is one customarily believed to be for solid waste collectors to pick up. Lastly, the can observed in plain view, could reasonably be observed, and subsequently led to discovery of other precursors for illegal controlled

> substance activity without a search warrant[.]

Burden did not indicate a subjective expectation of privacy when he placed his garbage out for removal since, as noted in *Greenwood,* any member of society might happen upon and even rummage through such trash. The officers' search and seizure of Burden's trash did not require a warrant.

Burden next argues that the issued search warrant was invalid under SCR 5.040 because it was signed by a trial commissioner who served an adjacent county and was then given concurrent authority in three counties by an order of the district court. We disagree. Burden cites *Commonwealth v. Shelton*, Ky., 766 S.W.2d 628 (1989), in which the court determined that a warrant issued by a trial commissioner for a county outside of his county of residence was invalid. The court stated that the trial commissioner "may be 'temporarily assigned by the chief judge of the district to serve' elsewhere 'within the district' (SCR 5.040)." *Id.* at 629. However, unlike *Shelton*, here, the chief district judge appointed the Breckenridge County trial commissioner as a temporary trial commissioner for Grayson and Meade Counties for a specified, five-day period, including the date in question, in accordance with SCR 5.040 and KRS 24A.030. The trial commissioner

therefore did not exceed her authority and the search warrant was not invalid under RCr 2.02(b) and SCR 5.040.

Burden further asserts that the search of his residence was illegal as based on separate and conflicting affidavits. One affidavit indicated that it was signed before the trial commissioner at 11:45 A.M. on July 23, 2002, the other indicated 11:45 P.M. on the same date. However, the inconsistencies clearly amounted to nothing more than a clerical error, as each affidavit states that the affiant had been conducting his investigation as late as 2:00 P.M. on July 23, 2002. Thus, it would have been impossible for the affidavits to have been signed at 11:45 A.M. on the same date. The trial court appropriately addressed this issue when it stated:

> The record contains sufficient evidence to indicate the officer acted in "good faith" reliance in conducting the search of the Defendant's premises **after** a search warrant was issued. *United States v. Leon*, 486 U.S. 897 (1984) and adopted in Kentucky in *Crayton v. Commonwealth*, 846 S.W.2d 684 (1992). There was no credible testimony offered to refute that the proper chronological order was followed or that the search warrant was not executed properly. The proof presented indicates if an error was made it was by the Trial Commissioner incorrectly marking the "a.m./p.m." portion of the Affidavit for Search Warrant.

Given the absence of any probative evidence of bad faith conduct, the error did not require suppression of the evidence, as historically suppression is a method used to deter police

misconduct. *Crayton v. Commonwealth*, Ky., 846 S.W.2d 684 (1992).

Finally, contrary to Burden's contention there is no evidence demonstrating law enforcement misconduct herein. We conclude the circuit court did not err in denying Burden's motion to suppress the evidence on this ground.

For the reasons stated above the judgment of the Grayson Circuit Court is affirmed.

ALL CONCUR.

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