

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002340-MR

CLIFFORD HUMFLEET

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 01-CR-00131

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant, Clifford Humfleet (Humfleet), appeals the Laurel Circuit Court's denial of his motion pursuant to RCr 11.42. Humfleet also appeals the circuit court's denial of his request for an evidentiary hearing. We affirm the trial court's ruling.

Humfleet was convicted of the manufacturing of methamphetamine. He was sentenced to serve twenty years. The Kentucky Supreme Court affirmed Humfleet's conviction on direct appeal. Humfleet filed an RCr 11.42 motion claiming various grounds for reversal of his conviction, including ineffective

assistance of counsel, the court's failure to grant a directed verdict, the court's failure to instruct the jury on a lesser-included offense, that the court erred by failing to sever Humfleet's trial from that of his brother, and that the court permitted improper questioning of witnesses. The Commonwealth responded to Humfleet's motion by showing that the issues raised in his RCr 11.42 motion had been raised on direct appeal. The Kentucky Supreme Court noted that the claimed errors were unpreserved for appellate review, but found no palpable error requiring reversal. The trial court so noted in denying Humfleet's motion. We affirm the finding that the issues raised in Humfleet's motion, with the exception of the ineffective assistance of counsel claim, were raised on direct appeal. No further review of those claims is necessary or permissible.

Humfleet argues that defense counsel's failure to suppress evidence seized during an illegal search constitutes ineffective assistance of counsel. Police came to Humfleet's property in search of a runaway juvenile. While on the property looking for the juvenile, the officers saw several individuals running into the woods. One suspect was caught, but the others escaped. During the chase, one investigating officer claimed to have smelled the chemical odor of a methamphetamine lab coming from a shed near the suspect's residences. An extension cord ran from one of the trailers to the shed. When one of the

suspects was captured, the officer took her back toward the shed and trailers for questioning. An officer looked inside the shed and found evidence of ongoing manufacture of methamphetamine. The suspect granted permission for the search of her trailer, adjacent to the shed. The trailer contained components for another methamphetamine lab. The officer noted that the power source for the methamphetamine lab came from an extension cord which ran out of Humfleet's trailer to the barn.

Humfleet contends that the shed was cartilage, and could not be searched without a warrant. The Commonwealth asserts that the chemical odor and extension cord provided proper cause for a warrantless search. The Commonwealth notes the known danger of an operating methamphetamine lab, and the fact that the location of the remaining suspects were unknown at the time the shed was examined as permitting the search. The burden is on the Commonwealth to demonstrate exceptional circumstances which properly supported a warrantless search. Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky. 2002). An exigency or emergency justifies a warrantless entry or search. Todd v. Commonwealth, 716 S.W.2d 242 (Ky. 1986). The possible destruction of evidence is also a recognized ground for warrantless entry. Cormney v. Commonwealth, 943 S.W.2d 629, 630 (Ky.App. 1996). Given the risks incident to remaining in the proximity of an operating methamphetamine lab, and the unknown

location of additional suspects, the warrantless entry into the shed has not been shown clearly unconstitutional.

Humfleet claims ineffective assistance of counsel in that defense counsel did not attempt to suppress the evidence found in the warrantless search. The Commonwealth argues that ineffective assistance of counsel was not shown. Failure to make a fruitless motion to suppress evidence does not constitute ineffective assistance of counsel. Robbins v. Commonwealth, 719 S.W.2d 742, 743 (Ky.App. 1986).

The trial court found no merit in Humfleet's ineffective assistance of counsel claims, and that defense counsel's representation did not fall below an objective standard of reasonableness under prevailing professional norms. The court found that a suppression hearing was not necessary as probable cause for a warrantless search existed, since the officer smelled a methamphetamine lab when he passed the barn.

The court cannot find counsel to have been ineffective in the absence of a showing of actual prejudice resulting from counsel's inaction. Casey v. Commonwealth, 994 S.W.2d 18, 23 (Ky.App. 1999). To find reversible error due to a claim of ineffective assistance of counsel, the defendant must show that the motion to suppress would have been successful. Sanders v. Commonwealth, 89 S.W.3d 380, 386 (Ky. 2002). No such showing was made by Humfleet. Based on the appellate record, there is

no support for an assertion that a motion to suppress would have been successful. There is no reversible error in the court's denial of the motion for post-conviction relief on the grounds of ineffective assistance of counsel.

Humfleet contends that the circuit court erred in denying him an evidentiary hearing on his motion for post-judgment relief. He asserts that the charges made in his motion could not be answered based upon the record, and that for this reason, a hearing was necessary. The trial court held that all issues raised in the motion could be answered following his review of the entire record, and that for this reason, no evidentiary hearing was necessary. An evidentiary hearing is not required where the record provides all necessary evidence for a ruling. Lawson v. Commonwealth, 386 S.W.2d 735 (Ky. 1965). There is no reversible error in the court's denial of the request for an evidentiary hearing.

HENRY, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT.

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