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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001152-MR

HOUSTON DALE GOLDSBERRY

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 03-CR-00393

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

TACKETT, JUDGE: Houston Goldsberry appeals from an order of the Henderson Circuit Court convicting him of manufacturing methamphetamine, tampering with physical evidence and possession of drug paraphernalia and sentencing him to ten years' imprisonment. Goldsberry entered a conditional guilty plea after the trial court refused to suppress the evidence and

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 KRS 21.580.

statements resulting from a warrantless search of his apartment. He contests the trial court's finding that exigent circumstances justified the search. We agree with the trial court and, thus, the decision is affirmed.

The Commonwealth introduced the testimony of two officers from the Henderson City Police Department at the suppression hearing. Officer Shane Onstott testified that he was on a routine patrol when he detected the smell of ether. The odor was strong enough to penetrate the rolled up windows of his car. He called for backup before exploring the area and determining that the smell emanated from the north side of Goldsberry's residence within ten to twenty yards of the building. Officer Shannon Troutman, who responded to Onstott's request for backup, found two fuming bottles in a ditch near the residence. Onstott examined the first bottle and observed an ongoing chemical reaction inside the bottle that was causing the fumes. He stated that the bottle and the fumes in the area indicated a methamphetamine lab and that someone had just finished making the substance. Consequently, Onstott requested additional officers as backup.

Onstott remained outside the premises conducting surveillance while Troutman attempted to obtain a warrant. After waiting for about an hour, Onstott approached the residence with four other officers. They attempted to get

someone to answer the door to the basement apartment where Goldsberry lived. Instead they heard whispering sounds and people moving around inside the apartment. The odor of ether was overwhelming, and the officers had to take turns standing outside the door in order to avoid being overcome by the fumes.

At some point, Troutman returned and said that he had received permission from the resident upstairs to search the basement. Officers knocked and announced their presence and, when Goldsberry finally opened the door, they entered to conduct the search. There were four people inside the apartment all watching television and acting as though nothing was going on despite the fumes and the rushing around that officers had heard. Officers found several mason jars that had just been rinsed out with gasoline and other items indicative of methamphetamine production.

On cross-examination, Onstott testified that the presence of trees between the road and the ditch where the bottles were found made it unlikely that they could have come from anywhere but the house where Goldsberry lived. He stated that the upstairs resident was the one who actually gave permission to search the basement, which he described as being a part of the house rather than a separate apartment.

Troutman was the second officer who testified for the Commonwealth. He testified that he too was struck by the strong

odor which he associated with manufacturing methamphetamine. Troutman said there were only three houses in the area and the odor was not detectable at the other two. He described finding the two fuming bottles in the ditch and the odor of ether emanating from them. Troutman then called for a backup unit and the newly arriving officers confirmed that the ether odor was only coming from the house where Goldsberry lived. He then attempted to get a search warrant from a local judge because the fumes seemed toxic and he was concerned about the people present in the house. The judge refused to sign the warrant and told Troutman that officers should attempt to make contact with the people inside the residence.

Some of the officers approached the door leading to the upstairs portion of the house while Troutman and Onstott went toward the basement door. Troutman heard a commotion inside, including the sound of running water, and he suspected that evidence of methamphetamine production was being destroyed. Officers who spoke with the upstairs resident confirmed that it was her house. She told police that she leased the basement area to her niece and Goldsberry and gave them permission to search provided they spoke to the basement's inhabitants first. In fact, she knocked on the basement door and asked Goldsberry to open it, but he refused.

Troutman then called the judge back and informed him of the homeowner's consent to search the basement and the toxic fumes coming from the apartment. The judge stated that sufficient information had been provided for a warrant to be issued and also that there were exigent circumstances. Troutman then called the county attorney who recommended that police enter the apartment without delay due to exigent circumstances and the need to evacuate the inhabitants. By that point, the fumes were so bad that officers considered donning gas masks as well as taking turns standing at the door.

When Goldsberry finally answered the door, he asked why police were there and whether they had a search warrant. Troutman informed him that they had to enter the apartment because of the chemical fumes coming from it. Inside, officers found several mason jars. Some had been rinsed out with gasoline while others were sitting in a sink of soapy water. There were also marijuana pipes, pipes that could be used to smoke crack or inhale meth, and aluminum foil with burn marks. Troutman testified that items found inside the apartment were indicative of manufacturing methamphetamine. After police searched the apartment, Goldsberry gave a statement implicating himself and another person also inside. He even told Troutman that the bottles found in the ditch outside had been used by himself and another person to manufacture methamphetamine.

Goldsberry and one other person were indicted for manufacturing methamphetamine, tampering with physical evidence and possession of drug paraphernalia. The two co-defendants challenged the search because the police did not have a warrant when they entered Goldsberry's apartment. The Commonwealth argued that police had consent to search from the homeowner who lived upstairs and that exigent circumstances existed due to the possible destruction of evidence and the hazard posed by the chemical fumes. The trial court found that the upstairs resident did not grant valid consent to search the apartment rented by her niece and Goldsberry; however, exigent circumstances existed which allowed the officers to conduct a warrantless search. Goldsberry entered a conditional plea and was sentenced to ten years' imprisonment. He reserved the right to appeal the trial court's refusal to suppress the evidence and statements taken during the search of his apartment.

Goldsberry argues that the trial court erroneously failed to suppress the evidence taken from his apartment and his statement to police. He contends that his Fourth Amendment right to be free from unreasonable searches was violated. There are recognized exceptions to the warrant requirement, including exigent circumstances; however, Goldsberry claims that none existed in this case. He cites the recent decision by the Kentucky Supreme Court in McManus v. Commonwealth, 107 S.W.3d

175 (Ky. 2003), holding that officers did not have exigent circumstances to conduct a warrantless search of a suspected indoor marijuana cultivation operation. In McManus, officers asked permission to search a residence after the estranged wife of one of the residents told them marijuana was being grown inside. The defendant refused and police told him that they would seek a warrant and he had better get rid of anything illegal before they returned. As they departed, officers looked through a window and saw the defendant and another man carrying grow lights and flower pots from inside the house. They entered and performed a search which resulted in marijuana being found. The Court determined that exigent circumstances did not exist because officers had not observed any illegal items in the house and there was no showing that the defendant could have disposed of the grow lights and flower pots before police returned with a warrant.

The facts in this case are sufficiently distinguishable from McManus to permit a different outcome. While officers waited outside the door, Goldsberry and his accomplices washed out the mason jars used to manufacture methamphetamine and there was no meth found inside the apartment. Furthermore, even absent the concern for destruction of evidence, officers had a legitimate reason to enter the apartment without a warrant. Officers believed the chemicals

inside Goldsberry's apartment were a health hazard. Troutman and Onstott both testified to an overwhelming odor of ether coming from the apartment. According to Troutman, the fumes seemed toxic and caused a burning sensation in officers' throats. Officers were sufficiently concerned about their own safety to consider donning gas masks in addition to taking turns going outside for fresher air. The fumes could only have been stronger inside the apartment where they were produced, and officers were certain people were present due to the whispered conversations and noises coming from inside. Thus, they were justified in entering the apartment to remove the inhabitants and determine whether there were dangerous chemicals present. Goldsberry argues that none of the people inside needed medical attention; in fact, they were sitting in front of the television. This does not negate the risk that the extremely strong fumes posed to the health of those inside.

For the forgoing reasons, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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