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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000292-MR

STEVE E. SCHOTT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 03-CR-002570

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

TACKETT, JUDGE: Steve Schott appeals from a judgment of the Jefferson Circuit Court finding him guilty of complicity to possess cocaine and tampering with physical evidence and sentencing him to ten years' imprisonment. He argues that the trial court was required to suppress evidence seized from his person because police officers were executing a search warrant for which probable cause had expired. He further contends that

¹ Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

he was entitled to a directed verdict on the charges and that cumulative errors resulted in an unfair trial. We disagree and affirm the trial court.

During March 2002, police in Louisville received complaints of drugs being sold at 2515 Bank Street, a house occupied by John Wright. Detective Derrick Payne conducted surveillance and observed a pattern of high traffic in and out of the house with visitors only remaining on the premises a short time. In addition, a confidential informant, who had previously supplied accurate information, told Payne that Wright was selling cocaine, crack and pills at his house. After presenting this information to a judge, Payne obtained a warrant to search the property and any persons located on it. The warrant was obtained on April 18, 2002, but the search was not carried out until April 23. A manpower shortage prevented officers from executing the warrant immediately, and then activity at 2515 Bank decreased, leading Payne to suspect that Wright had been tipped off about the search warrant.

When activity picked up on April 23, Payne decided that it was time to execute the search warrant. He observed a blue Chevy Tahoe pull behind the house and park and radioed for back-up, confident that trafficking activity was about to occur. Payne, accompanied by another officer, pulled into the driveway and got out of their car with weapons drawn. They observed two

men walking around the back of the house and Schott, the driver of the Tahoe, in his vehicle. Officers ordered Schott multiple times to keep his hands where they could see them. Schott ignored their orders and, through the Tahoe's open window, they observed him making grabbing and stuffing motions with his hands.

Officers first secured Wright and Clifton Whitmer, Jr., who were in the yard. Wright was found with digital scales in his pocket. Payne removed Schott from his vehicle and, concerned that Schott might have a weapon on his person, handed him to another officer who conducted a pat-down search. During the pat-down search, 14.2 grams of cocaine fell out of Schott's shorts onto the ground. Wright and Schott were charged with complicity to traffic cocaine and tampering with physical evidence, with the additional charge of possession of drug paraphernalia against Wright. Whitmer was released without charges being filed against him. Schott filed a suppression motion, arguing that the warrant was stale because of the five-day period that elapsed between the time it was issued and the time it was executed. He also argued that the search warrant did not grant officers a legal right to search his person. The trial court denied the motion. After a two-day jury trial, Schott was convicted of complicity to possess cocaine and tampering with physical evidence. The trial court imposed the

recommended sentence of five years' imprisonment on each charge, to run consecutively for a total of ten years. In a separate proceeding, Wright was acquitted on all charges. This appeal followed.

Schott first argues that the trial court should have suppressed the evidence seized from him because probable cause had dissipated between the time Payne sought the search warrant and the time it was executed. He further points out that the issue of a warrant growing stale has not been addressed in Kentucky. Nevertheless, this is not the appropriate case to resolve such an issue because Schott did not have standing to challenge officers' entry onto Wright's property. Standing to challenge a search requires a "legitimate or reasonable expectation of freedom from governmental intrusion." Rawlings v. Commonwealth, 581 S.W.2d 348, 350 (Ky. 1979). Schott, as a visitor to 2515 Bank Street, had no such reasonable expectation of privacy. Even if we find that the search warrant was valid, Schott contends that it did not give officers legal authority to search his person. We disagree. When officers arrived at 2515 Bank Street, Schott was in his vehicle. He subsequently ignored numerous orders to show his hands. Officers were justified in concluding that he might have hidden a weapon on his person. Thus, they were entitled to perform a brief, pat-down search

under the rule set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Next, Schott contends the trial court erred by overruling his motions for a directed verdict. On appeal, the standard of review for denial of a directed verdict is whether it was clearly unreasonable for the jury to have found the defendant guilty. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983). Kentucky Revised Statute (KRS) 524.100(1)(a) defines tampering with physical evidence as follows:

- (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
 - (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding. . . .

When officers arrived to execute the search warrant, Schott refused to keep his hands in plain view, and instead was observed making grabbing and stuffing motions. When an officer performed a brief Terry search, cocaine fell out of Schott's shorts where he had concealed it. Based on these facts, it was not unreasonable for the jury to find him guilty of attempting to conceal evidence that could be used to prosecute criminal charges against him.

Complicity is defined by KRS 502.020 as follows:

- (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
 - (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
 - (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
 - (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

- (2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:
 - (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
 - (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or
 - (c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Schott was originally charged with complicity to traffic cocaine, but ultimately convicted of complicity to possess cocaine. At trial, officers testified regarding their surveillance of Wright's residence and their conclusion that the activity at 2515 Bank Street likely indicated drug trafficking. When he was arrested, Wright had digital scales in his pocket which could weigh up to 100 grams. Scales of this type can be

used to weigh and package drugs for resale. Jurors were told that Schott was talking on his cell phone to Wright on the day the search warrant was executed. Wright told Schott to pull around behind the house. Whitmer testified that Schott had stated he was bringing them some stuff to party on. The cocaine Schott was carrying had a street value of \$600.00 - \$700.00, which could be doubled by dividing it into half-gram bindles. Officers testified that a typical user carries only one-half gram of cocaine, while a street dealer carries one-half ounce. There was no drug paraphernalia found in either Wright's residence or Schott's vehicle. The amount of cocaine (14.2 grams) Schott was carrying was consistent with the Commonwealth's theory that Schott was supplying Wright with cocaine to repackage and sell. Based on the evidence put before the jury, it was not clearly unreasonable for them to find that Schott was acting in complicity with Wright with regard to his drug possessing activities.

Schott also complains that his right to a fair trial was compromised when the Commonwealth introduced evidence of officers' surveillance of Wright's residence prior to asking for the search warrant and by the Commonwealth's use of the term drug dealer to describe Schott during the penalty phase of the trial. The trial court agreed with Schott's argument that evidence of Wright's drug dealing was prejudicial to Schott;

however, the court ruled that the evidentiary value outweighed the prejudice. Since Schott was charged with complicity to traffic cocaine with Wright, evidence that Wright was selling drugs out of his home was relevant to support the charge against Schott. Further, since the jury refused to convict Schott of trafficking and chose instead the lesser charge of possessing cocaine, he has failed to show that he suffered any prejudice from the trial court's decision to allow the evidence. Schott also claims that it was improper for the Commonwealth to refer to him as a drug dealer during the sentencing phase of his trial since the jury convicted him of possession, rather than trafficking. This ignores the fact that his criminal record, which was introduced during the sentencing phase, included two previous trafficking convictions. Thus, the Commonwealth's comment that Schott was a drug trafficker was supported by the evidence and was not improper.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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