

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000922-MR

JEFFREY N. JONES

APPELLANT

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
v. HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 04-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** *

BEFORE: BUCKINGHAM,¹ DYCHE, AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Jeffrey N. Jones appeals from a judgment and sentence on a guilty plea entered in Breckinridge Circuit Court. Jones argues that his conviction for manufacturing methamphetamine and possession of a controlled substance should be reversed because the trial court improperly denied his motion to suppress evidence obtained during a search. For the reasons stated below, we affirm the judgment on appeal.

¹ Judge David C. Buckingham concurred in this opinion prior to his retirement effective May 1, 2006.

On June 10, 2004, Kentucky State Police Trooper Seth Payne observed Jones purchasing several items at a BP gas station in Breckinridge County, Kentucky, which Payne recognized as items commonly used to manufacture methamphetamine. The items included a bottle of Red Devil lye, a box of cold medication containing pseudoephedrine, and two bottles of liquid Heat.

Payne approached Jones and questioned him about the purchase. Jones provided reasons for the purchases not related to the production of methamphetamine. Payne would later state that Jones appeared to be nervous and kept reaching for his pocket. Payne directed Jones to place his hands on the hood of Payne's vehicle while Payne ran a check on Jones's license and vehicle registration. As Payne was conducting the check, which revealed that the license and registration each were expired, Payne again saw Jones reaching for his pocket.

Payne then placed Jones in handcuffs and patted him down. Jones was found to be in possession of a film canister containing a powdery brown substance, which Jones stated was methamphetamine. After the film canister was found, and subsequent to Jones admitting that it contained methamphetamine, he was advised of his Miranda² rights.

² Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Having found Jones to be in possession of methamphetamine, Payne sought and obtained a search warrant for Jones's residence. A search was conducted and evidence was found indicating that Jones was engaged in the manufacturing of methamphetamine. The items found included iodine crystals, lighter fluid, mason jars, a gallon container of iodine, and suspected manufacturing residue.

On September 10, 2004, Jones was indicted by the Breckinridge County grand jury on one count each of manufacturing methamphetamine, first degree possession of a controlled substance, and possession of drug paraphernalia. On January 7, 2005, defense counsel advised the court that he intended to seek the suppression of the evidence obtained during the June 10, 2004 search. While no such motion was actually filed, the circuit court considered the issue because of the approaching trial date and entered an order on March 10, 2005 denying Jones's request to suppress the evidence. As a basis for the order, the court found that at the time of the search, Jones was on probation. One of the terms of the probation was Jones's waiver of his protection against warrantless searches during the probationary period. The court also found that the search of Jones's person was proper because it was a search incident to his arrest, and because Jones stated that he had a

knife in his pocket thus availing Payne of the right to search Jones to insure their mutual safety.

On March 30, 2005, Jones entered a conditional guilty plea, subject to the reservation of his right to appeal the suppression issue. Under the terms of the agreement, Jones pleaded guilty to the manufacturing count, and the possession and paraphernalia charges were dismissed. Jones was sentenced to 10 years in prison, and this appeal followed.

The sole issue for our consideration is Jones's contention that the trial court erred when it denied his motion to suppress the evidence obtained during the search of his person on June 10, 2004. Jones argues that his probationary status was not placed in the record in a timely manner and could not form a basis for the court's denial of his motion to suppress. He goes on to claim that even if he was subject to a consent search as part of his probationary status, Payne was not aware of Jones's probationary status at the time of the search and could not have relied on it as a basis for the search. And lastly, Jones maintains that his detention and search were not valid under Terry v. Ohio.³ In sum, he maintains that the search was unlawful and that the exclusionary rule should have been applied to suppress the introduction of the seized evidence at

³ 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

trial. He seeks an order reversing the order denying his motion to suppress.

We have closely examined the record, the written arguments and the law, and find no basis for reversing the order denying Jones's motion to suppress. The order was proper for at least two reasons, each of which was well-articulated by the circuit court in the order on appeal. First, it is uncontroverted that Jones was on probation on June 10, 2004, and that the terms of that probation included a waiver of his right against warrantless searches during the probationary period. This fact, taken alone, forms a sufficient basis for affirming the order on appeal.

In addressing a probationer's waiver of rights against warrantless searches, the Kentucky Supreme Court has held that "[w]hile the reasonable search requirement of the Fourth Amendment still applies, the requirement for a search warrant supported by probable cause does not."⁴ The record supports the conclusion that the search of Jones's person was reasonable, in that Payne testified that Jones was nervous and shaking, kept reaching toward the pocket where the methamphetamine was found, did not keep his hands on the hood of the vehicle as directed, was found to be operating a vehicle with expired registration

⁴ Wilson v. Commonwealth, 998 S.W.2d 473, 474 (Ky. 1999).

and license, and stated that he was in possession of a pocketknife.

Jones notes that Payne was not aware of his probationary status at the time of the search, and argues that this fact operates to remove his probationary status and waiver as a basis for the search. This argument is not persuasive. The cases relied upon by Jones in support of this argument are distinguishable from the facts at bar, and Jones has not overcome the strong presumption that the circuit court's ruling on this issue was proper.⁵ As a probationer, Jones's waiver of rights was effective irrespective of when Payne learned of it.

The second basis for denying Jones's motion to suppress was the circuit court's finding that an arrest occurred at the moment Jones was placed in handcuffs. After the arrest, Payne conducted a pat down search whereupon Payne found the film canister containing the powder. Such a search is wholly proper as a search incident to arrest,⁶ and the circuit court properly so found. Thus, even if Jones's waiver of rights as a probationer was invalid or otherwise ineffective under the facts at bar, the search was still proper after Jones was taken into custody.

⁵ City of Louisville v. Allen, 385 S.W.2d 179 (1964).

⁶ Davis v. Commonwealth, 120 S.W.3d 185 (Ky.App. 2003), citing United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

Lastly, it is worth noting that circuit court expressly found that any statements made by Jones after being detained, but before being advised of his Miranda rights, including Jones's admission that the canister contained methamphetamine, would be excluded from admission into evidence if the matter proceeded to trial. This conclusion of law was proper, and has no bearing on Jones's claim that the search was unlawful.

For the foregoing reasons, we affirm the order of the Breckinridge Circuit Court holding that evidence obtained during the search of Jones's person and residence was admissible.

BUCKINGHAM, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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