IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1997

FILED

March 19, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 02C01-9607-CC-00220**
Appellee,	)	
	)	**HENRY COUNTY**
VS.	)	
	)	**HON. JULIAN P. GUINN,**
	)	**JUDGE**
GERALD ROBERT STEVENS,	)	
LAURIE ANN WILLIAMS,	)	
JAMES DARREN BROTHERS,	)	
	)	(Manufacture of Schedule II
	)	controlled substance and possession
Appellants.	)	of unlawful drug paraphernalia)

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OPINION FILED: ______________

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

A.

Gerald Stevens, Laurie Williams, and James Brothers appeal as of right from a jury verdict of guilty for the manufacture of a Schedule II controlled substance (methamphetamine) and possession of unlawful drug paraphernalia. For the manufacture of a Schedule II controlled substance, Stevens was sentenced to five years and Williams and Brothers to three years and six months incarceration in the Tennessee Department of Correction. For possession of unlawful drug paraphernalia, Stevens, Williams, and Brothers were sentenced to 11 months and 29 days in the county jail. All sentences are to be served concurrently. The jury further fined each defendant $100,000 for the manufacture of the controlled substance and $2,500 for possession of unlawful drug paraphernalia. Defendants present four issues for our review: 1) whether the evidence was sufficient to sustain defendants' convictions for the manufacture of a schedule II controlled substance and possession of unlawful drug paraphernalia; 2) whether the trial court erroneously admitted certain photographs and items seized from defendants' residence; 3) whether the trial court improperly allowed use of the term "precursor" by the state's witnesses; and 4) whether the affidavit in the search warrant was sufficient.

We find no error and affirm the judgment of the trial court.

SUFFICIENCY OF EVIDENCE

All defendants argue the evidence was insufficient to sustain convictions for the manufacture of a schedule II controlled substance and possession of unlawful drug paraphernalia. Defendant Brothers asserts that his status on the searched premises as a "hired handyman and occasional chauffeur" does not justify his convictions.

A.

On an appeal questioning the sufficiency of evidence, it is not the function of this court to reweigh or re-evaluate evidence offered at trial. State v. Jones, 901

S.W.2d 393 (Tenn. Crim. App. 1995); State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). The trier of fact resolves issues of credibility, weight and value to be given evidence. Id. The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The ultimate issue is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); T. R. A. P. 13(e).

A jury verdict, approved by the trial court, accredits the testimony of witnesses for the state and resolves all conflicts in favor of the state's theory. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Accordingly, a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt requiring the accused to prove that the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

While following the above guidelines, this Court must remember that the jury decides the weight to be given to circumstantial evidence and that "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury." Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958); State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985); Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970).

B.

It is an offense for a defendant to knowingly manufacture a controlled substance. T.C.A. § 39-17-417(a)(1). Methamphetamine is a schedule II controlled substance. T.C.A. § 39-17-408(d)(2). It is also "unlawful for any person to use, or to possess with intent to use, drug paraphernalia to ... manufacture ... a controlled substance." T.C.A. § 39-17-425(a)(1). Drug paraphernalia is all equipment, products or materials of any kind, which can be used to manufacture a controlled substance.

T.C.A. § 39-17-402(12). Possession of a controlled substance can be based on either actual or constructive possession. State v. Brown, 915 S.W.2d 3, 7 (Tenn. Crim. App. 1995)(*citing* State v. Brown, 823 S.W.2d 576, 579 (Tenn. Crim. App. 1991)). Constructive possession can be shown if the defendant has the power and intention to exercise dominion and control over the controlled substance either directly or through others. Id. In essence, constructive possession is the ability to reduce an object to actual possession. Id.

C.

The record provides the following pertinent facts. Police officers noticed a chemical odor when they entered the residence. All three defendants were in the residence when the warrant was executed. When police officers entered the house, defendant Stevens ran toward the back door. Upon arrest, defendants Stevens and Williams gave police officers false names. A chemistry book with defendant Williams' initials inscribed was found during the search. From this search, officers determined the search of another area, a storage shed, was necessary and obtained a second warrant. Evidence seized from the storage shed included various glassware, tubes and funnels. Over 2,870,000 encased ephedrine tablets were found, one case visibly showing defendant Williams name. The storage shed was leased by both Stevens and Williams. Williams was identified as the person who actually executed the lease.

Defendant Brothers argues he was simply in the wrong place at the wrong time and presence alone cannot support the instant conviction. To the contrary, the record reflects that defendant Brothers was more than merely present on the searched premises. The record shows that defendant Brothers was found in the kitchen standing by the table on which the methamphetamine powder was scattered. He advised the officers he was only a chauffeur for Stevens and knew nothing about the drugs. The record further shows that the 911 emergency address and the phone number for the searched premises was in Brothers' name. There was also testimony that Brothers resided at the searched premises for up to a week at a time. Clearly,

the jury could infer that defendant Brothers was involved in this drug enterprise.

The record further reflects that the investigators on the scene found over 64 grams of methamphetamine base in the kitchen, 7.8 grams of methamphetamine powder in the bedroom, and 1 gram of 96% pure methamphetamine powder in the utility room. Other evidence included 3 sets of scales, a black box containing various glassware and tubes, a blue notebook with instructions on how to manufacture methamphetamine, several chemistry books, a metal box containing $4,900 in cash and a wallet containing $1,100 in cash. Furthermore, all the chemicals necessary for the manufacture of methamphetamine (ephedrine, red phosphorous, iodine, muriatic acid, and acetone) were found at the residence. It takes not a scientist to ascertain what was happening on these premises. There is overwhelming evidence to support each defendant's convictions for the manufacture of a controlled substance as well as possession of unlawful drug paraphernalia. This issue is without merit.

ADMISSION OF EVIDENCE

Defendants next argue the trial court erred in admitting certain evidence seized from the residence including chemistry books, firearms, and photographs. Specifically, defendants contend the foregoing evidence was irrelevant and that its probative value was outweighed by its prejudicial effect.

The decision to admit or exclude evidence based on relevancy is left to the sound discretion of the trial judge, and his or her discretion will not be disturbed unless it is arbitrarily exercised. State v. Davis, 872 S.W.2d 950, 955 (Tenn. Crim. App. 1993); State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1989). Whether the probative value of evidence is substantially outweighed by the danger of confusing issues, misleading the jury, or undue waste of time is also within the sound discretion of the trial judge. State v. Burlison, 868 S.W.2d 713, 721 (Tenn. Crim. App. 1993).

A.

Defendants specifically objected to the admission of three chemistry notebooks entitled, “General Chemistry”, “General Organic and Biological Chemistry,” and “The Facts on File Dictionary of Chemistry.” The three chemistry texts contained defendant Williams’ initials. Further objection was made to a blue notebook containing instructions on how to manufacture methamphetamine. This evidence was relevant and highly probative to the charge of manufacturing methamphetamine. This issue is without merit.

B.

Defendants further objected to the introduction of photographs depicting various chemicals and drug paraphernalia. The objection was based on relevance, lack of probative value and prejudicial effect. When determining the admissibility of photographs, the court must first determine that the evidence is relevant to the issues at trial and then decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978); Tenn. R. Evid. 401, 402, 403. Admissibility of photographs falls within the sound discretion of the trial judge whose ruling will not be overturned except upon a clear showing of an abuse of discretion. Banks, 564 S.W.2d at 949. We find no abuse of discretion. This issue is without merit.

C.

The admissibility of the loaded firearms presents a closer question. Even if this evidence was improperly admitted, the admission was clearly harmless. T. R. A. P. 36(b). This issue does not merit relief.

D.

Defendants argue the trial court deprived them of their constitutional right to confront and cross-examine adverse witnesses by admitting photographs depicting various jugs, chemical bottles, funnels, tubes, canisters and drug paraphernalia which were seized from the residence and subsequently destroyed by a Drug Enforcement Agency (DEA) contractor. Defendants contend the destruction of the seized items prior to an opportunity by the defense to conduct independent tests

impaired their ability to effectively cross-examine. At trial, defendants based their objection to these photographs on relevance and prejudicial effect.

In Tennessee, a party is bound by the ground asserted when making an objection. State v. Adkisson, 899 S.W.2d 626 (Tenn. Crim. App. 1994); State v. McPherson, 882 S.W.2d 365 (Tenn. 1994); State v. Mathews, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990); State v. Aucion, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988) *cert. denied*, 489 U.S. 1084, 109 S.Ct. 1541, 103 L.Ed. 2d 845 (1989). On appeal, a party cannot assert a new or different theory to support the objection. Id. Furthermore, a defendant may not object to the introduction of evidence on one ground and assert a new basis or ground for the objection on appeal. State v. Aucion, 756 S.W.2d at 715. This rule has been applied when a party makes an objection based upon a non-constitutional ground, abandons that ground, and asserts a constitutional ground for the objection post trial. State v. Adkisson, 899 S.W.2d at 635 (citations omitted).

After careful review of the record, it appears defendants raise on appeal for the first time their objection to the admissibility of the above photographs based on their inability to confront and cross-examine adverse witnesses. They based their continuing objection to the several photographs introduced at trial solely on relevance and prejudicial effect. Although defense counsel objected to testimony about the destroyed items, the record is deficient as to an objection to the admissibility of the photographs on constitutional grounds. The issue was, therefore, waived.

Furthermore, the record reflects that defendants were given an opportunity by the court pre-trial to examine and test samples taken by the DEA of the items depicted in the photographs. Except for the samples from the items taken by the DEA and made available to the defense, no other evidence from the destroyed items was introduced at trial. This issue is without merit.

USE OF THE TERM “PRECURSOR”

Defendants next argue that the use of the term “precursor” by the state’s witnesses was unfairly prejudicial. Specifically, defendants contend “immediate precursor” is a legal term of art. T. C. A. § 39-17-402 (13).

During trial, state officials used the term to describe chemical items found at the residence. Later, a federal agent and a senior DEA chemist involved in the case used the term “precursor” in a similar manner to explain the chemical process of manufacturing methamphetamine. Defense counsel cross-examined the witnesses regarding their knowledge of the meaning of the term “precursor” under Tennessee law. Both the federal agent and the chemist testified that 1) they were unfamiliar with the Tennessee legal definition of the term “precursor” but used it to mean something essential to the manufacture of a chemical substance; and 2) their use of the term “precursor” was not a legal conclusion and was based on their personal experiences with chemical interactions. The trial judge did not abuse his discretion in allowing the use of the term “precursor”. This issue is without merit.

SEARCH WARRANT

Defendants Stevens and Williams contest the constitutionality of the search warrant leading to the seizure of evidence from the residence and storage shed. Specifically, defendants argue the trial court should have granted their motion to suppress the resulting evidence because the affidavit which supported the search warrant failed to show 1) the basis of the informant’s knowledge and 2) the veracity of the informant. The state contends that this showing was unnecessary because the information in the affidavit was derived from a “citizen source.” During the suppression hearing the trial court determined that the affidavit used to support the search warrant passed constitutional muster. On appeal, a trial court's findings of fact on a motion to suppress are conclusive unless the evidence preponderates against those findings. State v. Woods, 806 S.W.2d 205, 208 (Tenn. Crim.

App.1990), *cert. denied*, 502 U.S. 1079, 112 S.Ct. 986, 117 L.Ed.2d 148 (1992); State v. Johnson, 717 S.W.2d 298, 304-05 (Tenn. Crim. App. 1986).

A.

The subject affidavit of the police affiant stated the following:

"An adult concerned citizen source who is believed to be credible and liable [sic] and who resides in Henry County and has family ties to Henry County has told the affiant that they had seen methamphetamine being stored and cooked within 72 hours prior to the swearing of this affidavit at the above stated residence. The citizen told the affiant that they had seen several flask [sic], tubes, hot plate [sic] and several jugs sat [sic] up in the rear room of the residence. The citizen told the affiant that they had noticed a bad odor in the residence also. The citizen told the affiant of the cooking process they had seen and the affiant having knowledge of the cooking process, believed the citizen to be reliable and truthful in their information. The citizen ask [sic] for no payment for their information and acted on civic duty. Based on the above stated information the affiant believes that Williams is cooking and storing methamphetamine at the said resident [sic]. The citizen source was furnished with the finished product of what they had seen being cooked and immediately turned over to Officer Wyrick and Officer Eaker. The product was field tested and product was found to be methamphetamine. The affiant asked that the search warrant be valid up to 48 hours for securing and execution of the search warrant to allow D.E.A. participation from agents outside the state."

B.

The Fourth Amendment warrant requirement demands that a probable cause determination be made by a neutral and detached magistrate. State v. Jacumin, 778 S.W.2d 430, 431 (Tenn. 1989); State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992). When probable cause is supplied by affidavit to a magistrate where the informant is from the criminal milieu, application of the two-prong Aguilar-Spinelli test is required. State v. Cauley, 863 S.W.2d 411, 417 (Tenn. 1993). Under the Aguilar-Spinelli standard the affidavit must set forth the basis of the informant's knowledge and the veracity of the informant. State v. Valentine, 911 S.W.2d 328 (Tenn. 1995); Cauley, 863 S.W.2d at 417.

Tennessee applies a different standard to "citizen informants." State v. Melson, 638 S.W.2d 342 (Tenn.1982), *cert. denied*, 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983). Where the affiant receives information from a "citizen informant," the affidavit is not subject to the same degree of scrutiny as where the information is received from a "confidential informant." Id. at 354. A search warrant,

based upon a statement of the citizen informant, is adequate when the information supplied by the affidavit intrinsically accredits the informant. Id. at 355. Citizen sources are presumed reliable, and the affiant is not under any obligation to establish that the source is credible or that the information is reliable. Id. at 356.

"Information supplied to officers by the traditional police informer is not given in the spirit of a concerned citizen (emphasis added), but often is given in exchange for some concession, payment, or simply out of revenge against the subject. The nature of these persons and the information which they supply convey a certain impression of unreliability, and it is proper to demand that some evidence of their credibility and reliability be shown . . . [h]owever, an ordinary citizen who reports a crime which has been committed in his presence, or that a crime is being or will be committed, stands on much different ground than a police informer." State v. Smith, 867 S.W.2d 343, 347 (Tenn. Crim. App. 1993)(*citing* State v. Paszek, 50 Wis.2d 619, 184 N.W.2d 836, 842-843 (1971)).

C.

The affidavit submitted to the issuing magistrate stated the information was received from a "concerned citizen," who asked for no payment for the information and acted on "civic duty."[1] The affiant police officer set out within the affidavit that the information was derived from a "citizen source" which enabled the magistrate to apply the Melson standard of review. The affidavit further provided that the informant, had actually seen: 1) "... methamphetamine being stored and cooked within 72 hours ... at [the residence] "; and 2) "... several flask [sic], tubes, hot plate [sic] and several jugs sat [sic] up in the rear room of [the residence]." The citizen informant also provided the affiant with a sample of the finished product which he/she had seen cooked. The sample was field tested by the affiant and found to be methamphetamine. Based on this information, the officers believed the citizen source to have described a methamphetamine lab. The reliability of the source and

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[1]The proof at the suppression hearing indicated the citizen informant was subsequently paid a sum of money even though it had not been requested.

all the information must be judged from all the circumstances and from the entirety of the affidavit. Melson, 638 S.W.2d at 356. This information supports the Melson standard for a citizen informant. This affidavit clearly established probable cause for the issuance of the search warrant. This issue is without merit.

The judgment of the trial court is AFFIRMED.

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JOE G. RILEY, JUDGE

CONCUR:

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JOE B. JONES, PRESIDING JUDGE

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JOHN H. PEAY, JUDGE