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No. 04-92705-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS, PLAINTIFF-APPELLANT,

v.

JARET LANE HAWKINS, DEFENDANT-APPELLEE

BRIEF OF APPELLEE JARET LANE HAWKINS

APPEAL FROM THE DISTRICT COURT OF SUMNER COUNTY
HONORABLE R. SCOTT McQUIN, JUDGE
DISTRICT COURT CASE NO. 03-CR-285

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STATEMENT OF THE CASE

The State of Kansas, through the County Attorney of Sumner County, Kansas, charged Jaret Lane Hawkins ("Hawkins") with five (5) counts relating to the unlawful manufacture of methamphetamine. Hawkins plead not guilty and filed a Motion to suppress, and have held inadmissible, all physical evidence seized pursuant to a search warrant from a shed owned by his next-door neighbor where together they engaged in a joint business venture repairing, restoring and selling motor vehicles, on the ground that admission of such evidence would violate the rights guaranteed to him by the Fourth and Fourteenth Amendments to the United States Constitution and Section 15 of the Kansas Bill of Rights, as well as K.S.A. 22-2501, 22-2502 and 22-2506. The District Court of Sumner County, Kansas, granted Hawkins' Motion and suppressed the evidence in question, finding that because of his interest in the business venture conducted in the shed, Hawkins had a reasonable, protected expectation of privacy – analogous to the reasonable expectation of privacy a lawyer has in his office located in a building owned by his law partner – that gave him "standing" to contest the illegal search of the shed predicated on previous illegal searches of the shed and "exigent circumstances" created by possible detection of the illegal entry. The State brings this interlocutory appeal.

STATEMENT OF ISSUES

1. Whether Hawkins had a constitutionally-protected reasonable expectation of privacy in the shed.

2. Whether exigent circumstances justified the warrantless entry.

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STATEMENT OF FACTS

On December 11, 2003, at about 1:40 a.m., Deputies Brien Swingle and Risa Hofmeier-Cook[1] were driving the dirt roads of Perth, Sumner County, Kansas, a rural town having a population of less than 40, looking for meth labs when they say they smelled the odor of ether or starting fluid – a legal substance – coming from a shed 150 to 200 yards away on property located at 261 Custer ("Custer property"). (R. II, 5-6, 8, 28, 29, 34, 41, 83.) Swingle got out of his vehicle and walked in only one direction along a public road and supposedly detected the odor of anhydrous ammonia, another legal substance, in addition to the ether, which he reported to Hofmeier-Cook. (R. II, 9-10, 39, 45, 83.) Despite these odors, he did nothing to protect the health and safety of himself, Hofmeier-Cook or the citizens of Perth. (R. II, 47-48.)

Swingle and Hofmeier-Cook were in Perth specifically to check out the Custer property because she had been there before, on November 15, 2003, at about 2:00 a.m., supposedly looking for a "Josh Brown" who was a suspect in a hit-and-run accident that did not occur until November 21, 2003, in Belle Plaine, some 25 miles away from the Custer property, and his vehicle was recovered in Wellington. (R. II, 79-80, 84, 93-96, 104-06, 140-41.) Without consent or a search warrant or, for that matter, any other circumstance justifying her entry, Hofmeier-Cook went looking around the buildings on the Custer property, smelled the odor of ether coming from a certain shed, and entered the building through the south door. (R. II, 99-100, 102, 105.) She observed four or five starter fluid

[1]Risa Hofmeier changed her last name after the incident date and is now known as Risa Cook. (R. II, 79.)

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(ether) cans laying around a burn barrel and a propane tank with an attached garden hose and a blue corrosive substance around the nozzle indicating it had been used to hold anhydrous ammonia. (R. II, 82-84.) She could not observe any of this from the road, but only after she entered the property. (R. II, 103-04.)

Not surprisingly, and notwithstanding the presence of other buildings in the general vicinity, including one closer to the area where they first encountered the odors, Swingle and Hofmeier-Cook focused immediately on that shed on the Custer property as the "obvious" source and the location of a possible meth lab. (R. II, 35-38, 40, 42, 107-08.) Without consent or a search warrant, Swingle and Hofmeier-Cook headed to the shed, some 30 to 40 yards from the house, where they heard talking or coughing inside. (R. II, 10-12, 22-23, 51, 84, 111.) Supposedly it was because it was the only building with a light on, but on cross-examination, Swingle conceded that the shed had no windows or translucent doors as same numerous angles from which it that he could see light coming through the exhaust fan in the only window. (R. II, 24-26, 44, 52-59.) Further, Hofmeier-Cook offered conflicting testimony that, in fact, lights were on in the house at that time. (R. II, 112.) They decided to back out "for [their] safety" and call more officers to the scene. (R. II, 12, 84.)

Once Sheriff Gilkey and Detective Bristor arrived, without consent or a search warrant, "just probable cause" based only on the odors of both ether and anhydrous ammonia, all of the officers entered the property because, as Hofmeier-Cook testified, "we were 99 percent sure there was probably a meth lab in there and that there was *[sic]* individuals in there actively making methamphetamines" in the shed. (R. II, 20, 23, 85, 113.) They did not go get a warrant because:

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> Number one, we were concerned maybe someone had seen us the first time because we were – we were right at the shed. The lights were all on in the house. Didn't know who might of seen us. We were concerned that if we waited too long that – that the subjects would leave the property and evidence would be gone.

(R. II, 85.) Instead, they knocked on an interior door; Hawkins unlocked the door from the inside and opened it. (R. II, 20, 23.) No search warrant for the Custer property was signed until approximately six (6) hours later. (R. II, 148.)

Based on evidence found inside the shed, Hawkins was charged in a five-count complaint ("Complaint") with various drug violations relating to the unlawful manufacture of methamphetamine.[2] (R. I, 10-12.) The trial court granted Hawkins' motion to suppress this evidence, and the State appeals.

STANDARD OF REVIEW

Where the facts material to a decision on a motion to suppress evidence are not in dispute, the question whether to suppress is a question of law subject to unlimited review. *State v. Boyd*, 275 Kan. 271, 273, 64 P.3d 419 (2003).

Review of the State's Brief indicates it disputes the material facts underlying the trial court's decision. In such instances, appellate courts do not re-weigh the evidence, but

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[2]Specifically, Hawkins was charged with: (1) unlawfully manufacturing or attempting to manufacture methamphetamine, contrary to K.S.A. 65-4159 and K.S.A. 21-3301, a severity-level 1 drug-grid felony; (2) possession of methamphetamine, contrary to K.S.A. 65-4160, a severity-level 4 drug-grid felony; (3) possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine, contrary to K.S.A. 65-7006, a severity-level 1 drug-grid felony; (4) possession of anhydrous ammonia in an unapproved container with intent to produce a controlled substance, contrary to K.S.A. 65-4152(a)(4), a severity-level 4 drug-grid felony; and (5) possession of anhydrous ammonia with intent to manufacture a controlled substance, contrary to K.S.A. 65-7006, a severity-level 1 drug-grid felony. (R. I, 10-12.)

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determine whether the factual underpinnings of the trial court's decision are supported by substantial competent evidence; only the ultimate legal conclusion drawn from those facts is reviewed de novo. *State v. Alvidrez,* 271 Kan. 143, 145, 20 P.3d 1264 (2001). Ultimately, the burden is on the State to show that a claimed illegal search was lawful. *Boyd*, 275 Kan. at 273. *See also State v. Tonroy*, __ Kan.App.2d ___, __ P.3d ___ (No. 91,216, July 2, 2004).

ARGUMENT

Substantial competent evidence exists to support the trial court's findings that Hawkins' constitutionally-protected reasonable expectation of privacy was violated by law enforcement's warrantless entry into the shed, and the trial court's suppression of the State's evidence must be affirmed.

1. The State presented no evidence to refute defense testimony that the shed was defendant's place of business.

Courts look to the totality of the circumstances in determining whether an individual has a constitutionally-protected reasonable expectation of privacy: whether the individual, by his conduct, exhibits an actual or subjective expectation of privacy or whether he has sought to preserve the item as private and, if so, whether it is an expectation society is prepared to recognize as reasonable. *State v. Cooper*, __ Kan.App.2d ___, ___, 23 P.3d 163, 165 (2001); *State v. Huber*, 10 Kan.App.2d 560, 566, 704 P.2d 1004, 1010 (1985) (citing *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979)); *see also Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). The burden is

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on the defendant to show an expectation of privacy in the property searched. *State v. Gonzalez*, 32 Kan.App.2d 590, 85 P.3d 711 (2004).

The State contends, without stating any authority in support, that Hawkins did not meet this burden because, apparently, Hawkins never affirmatively stated, "I have an actual, subjective expectation of privacy in the shed":

> The defendant never testified that he had an expectation of privacy in his neighbor's shed. There is no evidence in the record that the defendant felt he had an actual subjective expectation of privacy.

State's Brief at 8. This argument ignores the totality of the evidence presented by the defense – found by the trial court to be ***unrefuted*** by the State (R. II, 194) – that Hawkins and Kevin Davis, the owner of the Custer property, were engaged in a joint business venture repairing, restoring and selling motor vehicles. Thus, the State's underlying argument is that the trial court erred in believing Davis' and Hawkins' testimony, and appellate courts do not assess witness credibility.

Further, substantial competent evidence does support the trial court's finding of fact. Hawkins and Davis were working together in Davis' shed in late 2003, going in together to buy and fix up old cars to sell for profit. (R. II, 156-57, 164.) Hawkins and Davis kept parts and tools in the shed to work on the cars kept just to the east. (R. II, 157, 164.) Through Davis, Hawkins introduced testimony that he had the ability to exclude other people from coming into the shed, particularly to the extent necessary to protect his property, his tools. (R. II, 157, 160.) Hawkins himself testified that he had the ability to exclude the general public and law enforcement from Davis' property. (R. II, 171.) In response to questioning by the trial court, Hawkins stated that he believed that he had the ability to exclude someone

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he did not know from Davis' property if not advised that Davis had invited that person to work on cars. (R. II, 173-74.) Moreover, other testimony, elicited from Swingle in particular, established that the shed had no windows or transparent doors (R. II, 52-55), and that the door to the area where Hawkins was located was locked from the inside (R. II, 20), raising the presumption that any activity therein would remain private. The State makes much of the fact that Davis and his family were allowed in the shed, but an individual does not voluntarily surrender his legitimate expectation of privacy from improper governmental intrusion simply because he shares his privacy with a few others. *U.S. v. Andrews*, 618 F.2d 646, 655 (10th Cir. 1980).

2. Society repeatedly has recognized as reasonable an individual's expectation of privacy in his place of business.

The trial court found that *unrefuted* testimony established that Hawkins and Davis were engaged in a joint business venture in the shed. (R. II, 194.) Controlling precedent has established the resulting legal conclusion – that an individual has a reasonable expectation of privacy in his workplace against police intrusions. *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); *U.S. v. Anderson*, 154 F.3d 1225 (10th Cir. 1998); *U.S. v. Leary*, 846 F.2d 592 (10th Cir. 1988). Cases involving seizures from the workplace turn on the relationship or "nexus" of an individual to the area searched in determining whether an individual has standing to contest the search. *Anderson*, 154 F.3d at 1230. Through Davis' testimony, as well as his own, Hawkins established the requisite nexus between himself and the shed as his workplace, and once the State conceded this contention, the trial

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court was bound to conclude that he had a reasonable expectation of privacy therein. Accordingly, the trial court must be affirmed.

The State makes absolutely no effort to discuss or distinguish these cases. Instead, it reargues the trial court's finding of fact by asserting that no evidence established that Hawkins was an overnight guest (State's Brief at 9, 11-12); Hawkins never claimed this relationship with Davis or his property. Further, its argument that Hawkins is not entitled to an expectation of privacy because he allegedly was engaged in illegal conduct (State's Brief at 10) is illogical and constitutes an "end justifies the means" analysis that mocks the intention of the Fourth Amendment. Were the State's reasoning true, only those against whom no incriminating evidence had been seized would have standing to contest an illegal search. Finally, the State cites no authority indicating that an individual's expectation of privacy in his workplace should be limited in any way, thus distinguishing *State v. Mudloff*, 29 Kan.App.2d 1075, 36 P.3d 326 (2001), involving the *limited* expectation of privacy in a public bathroom stall in a bar which disappeared when the defendant entered the stall with another person and had an audible conversation that indicated to a bar employee that they were snorting drugs.

3. Substantial competent evidence exists to support the trial court's findings that probable cause, if any, was based on previous illegal searches and that law enforcement created the "exigent circumstances" the state contends justifies the warrantless entry.

Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment to the United States

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Constitution, subject only to a few specifically established and well-delineated exceptions. *State v. Platten*, 225 Kan. 764, 769, 594 P.2d 201, 205 (1979). Here, the State relies upon the exigent circumstances exception (State's Brief at 13) which allows a warrantless search where there is probable cause for the search and exigent circumstances justify an immediate search. *State v. Weas*, 26 Kan.App.2d 598, 600, 992 P.2d 221, 223 (1999).

As a threshold matter, Hawkins disputes that probable cause for a search exists. Note that the State conveniently avoids any discussion of the trial court's ruling regarding probable cause:

> You know, as far as probable cause, much of the information gathered to come up with probable cause was based on illegal searches at the time of the car accident where they were supposedly looking for Josh Brown and going on to the property. And they were illegally searching the property. They were on to the property when they smelled the anhydrous, so you can't say that gives them probable cause to go on to the property they're already on to. Couldn't smell it from the road.

(R. II, 192.) Substantial competent evidence supports this ruling: sometime in November, Hofmeier-Cook went looking around the buildings on the Custer property and entered the shed through the south door without consent, a search warrant or any other circumstance justifying her entry (R. II, 99-100, 102, 105); the discrepancy in the dates and other circumstances apparently made the trial court skeptical regarding whether she was really looking for a "Josh Brown" (R. II, 79-80, 84, 93-96, 104-06, 140-41); and Hofmeier-Cook admitted that on December 11, 2003, the only probable cause they had was the blended odor of two legal substances (R. II, 113). The State concedes that, standing alone, the odor of a legal substance, even one known to be used in the manufacture of methamphetamine, does not give rise to probable cause for a search. *State v. Blair*, 31 Kan.App.2d 202, 62 P.3d 661

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(2002), and *State v. Bowles*, 28 Kan. App. 2d 488, 18 P.3d 250 (2001) (both involving ether). The State cites no authority for its proposition that the combined odors of two legal substances – such as ether and anhydrous ammonia – create probable cause when neither alone is sufficient.

Bottom line, if the officers really and truly had probable cause, they should have applied for a search warrant, because even with probable cause, the State cannot establish exigent circumstances. Again, the State avoids discussion of the trial court's ruling regarding exigent circumstances:

> And I think one of the officers testified that the – the real exigent circumstances was that they thought maybe the people in the shed had seen them out there snooping around. So you can't create your own exigent circumstances and then used that as a justification to go search.

(R. II, 192.) And again, substantial competent evidence supports this ruling: Hofmeier-Cook so testified on direct examination by the State. (R. II, 85.)

Instead, the State suggests that the trial court erred in believing the testimony of Hofmeier-Cook – *its own witness* – because it focuses solely on the loss of evidence that potentially would have occurred had the officers bothered to obtain a search warrant. (State's Brief at 17-18.) The possible loss or destruction of evidence in and of itself cannot constitute exigent circumstances, but it is only one factor to be considered; the State fails to discuss the others. *See Platten*, 225 Kan. at 770, 594 P.2d at 206. Exigent circumstances requires a *clear* showing of probable cause, seemingly absent here, and further, there was no indication that Hawkins might have been armed. (R. II, 65.) The State did not establish that exigent circumstances were present, and accordingly, the trial court must be affirmed.

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CONCLUSION

The State of Kansas contends that halting the production of methamphetamine and preventing the destruction of evidence justified entry into a shed without a warrant. This is an "end justifies the means" analysis that courts abhor. Instead, substantial competent evidence supports the trial court's findings of fact that Hawkins and the owner of the shed were engaged in a joint business venture repairing, restoring and selling motor vehicles, that much of the information accumulated for probable cause was based on previous illegal searches, and that law enforcement created "exigent circumstances" if they thought the people in the shed had seen them out "snooping around." Under any standard of review, the trial court was correct in determining that Hawkins' constitutionally-protected reasonable expectation of privacy was violated by law enforcement's warrantless entry into the shed, and accordingly, the suppression of the State's evidence must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that five (5) true and correct copies of the above and foregoing were mailed, by U.S. Mail, postage pre-paid, to:

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with a courtesy copy to:

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Dated this _____ day of August, 2004.

_____
ATTORNEY FOR APPELLEE