No. 18-120,028-A

IN THE
COURT OF APPEALS
OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs

JAMES LAWTON THORNTON
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Douglas County, Kansas
Honorable Sally Pokorny, Judge
District Court Case No. 17CR729

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NATURE OF THE CASE

James Thornton rode his bicycle without any lights on, breaking a local ordinance. As such, an officer tried to pull him over. Thornton avoided apprehension for a short time, but ultimately, the officer stopped him and arrested him on an outstanding warrant. Thornton had a marijuana pipe on his person and a syringe in his backpack. The officer also discovered a baggie of drugs along his bicycle route. A jury convicted Thornton of multiple drug-related offenses, and he appeals.

STATEMENT OF THE ISSUES

I. **Even though the officer lacked the authority to search the backpack, the discovery of the marijuana and methamphetamine is not fruit of that poisonous tree.**

II. **Because possessing multiple pieces of drug paraphernalia is still a single act, a unanimity instruction is not required.**

STATEMENT OF FACTS

On a cold December night, Officer Peter Kerby responded to a call as usual. (R. X, 112-13.) Afterward, as he headed to his car, he noticed somebody riding a bicycle without any lights or reflectors. (R. X, 113.) Because city ordinances required them, Kerby tried to pull the bicyclist over. (R. VI, 14; X, 113.) Instead, the man ignored the police lights, spotlight, and horn and kept riding. (R. X, 113-15.) Eventually, Kerby used his vehicle to edge the bicyclist off the road. (R. X, 115.) The bicyclist stopped for a split-second but ultimately squeezed past the car. (R. X, 115-16.) Again, Kerby used his vehicle to block the rider (R. X, 115-16.) This time, the bicyclist stopped for good, and Kerby handcuffed him. (R. X, 116.)

The bicyclist ended up being Thornton, and he had an active warrant out for his arrest. (R. VI, 20.) He also had a machete hooked to his backpack. (R. X, 117.) Another officer, Matthew Roberts, arrived a moment later. (R. X, 127, 174.) He searched Thornton more thoroughly and discovered a glass marijuana pipe. (R. X, 127, 175-76.) Meanwhile, Kerby looked through the

backpack and discovered an orange-tipped syringe. (R. X, 130-32.) Then, both officers retraced Thornton's path to see if he had dropped or discarded anything while he rode. (R. X, 132, 177.) As it happened, Kerby found a plastic baggie that contained both marijuana and methamphetamine near a mailbox. (R. X, 132-33, 137.)

The State charged Thornton with possession of methamphetamine, marijuana, and drug paraphernalia. (R. I, 12.) Before trial, he moved to suppress the syringe and the drugs Kerby discovered. (R. I, 30-35.) There, he claimed that the officers had no authority to search his backpack. (R. I, 32-33.) Kerby and Roberts both testified at the motion hearing. Kerby recalled his attempts to stop Thornton. (R. VII, 4-7.) He recalled separating Thornton from his backpack and machete. (R. VII, 7-8.) After discovering the warrant, he searched the backpack "incident to arrest." (R. VII, 9.) That said, he testified that he also suspected to find drugs in the backpack based on the location. (R. VII, 10.) Thornton had actually come from a house well-known to officers because of the "criminal behavior, drug activity, subjects with warrants, [and] stolen property" associated with it. (R. VII, 10-11.)

Kerby testified that he searched the backpack around the same time Roberts discovered the pipe. (R. VII, 11-12.) But he explained that he retraced the bicycle's path because he suspected Thonrton had a reason for evading him. (R. VII, 12-13.) In fact, he clearly testified that he would have searched Thornton's route no matter the result of the search. (R. VII, 13-14.)

Roberts arrived after Kerby had already detained Thornton. (R. VII, 24.) He recalled Thornton saying he had a marijuana pipe on him, which Roberts quickly recovered. (R. VII, 24-26.) Like Kerby, Roberts could not remember if he discovered the pipe before Kerby completed his search of the backpack. (R. VII, 26.)

The district court denied the motion. (R. VII, 36.) At trial, Kerby and Roberts again testified about that night. (R. X, 108-41, 171-78.) A scientist with the KBI confirmed that the

substances in the baggie were marijuana and methamphetamine. (R. X, 191-200.) In the end, the jury convicted Thornton of all three offenses, and the district court sentenced him to 18 months' imprisonment. (R. I, 63-65, 103.) He timely appealed. (R. III.)

ARGUMENTS AND AUTHORITY

I. Even though the officer lacked the authority to search the backpack, the discovery of the marijuana and methamphetamine is not fruit of that poisonous tree.

First, Thornton reasserts that the district court needed to suppress the evidence uncovered in his backpack and on the road. (Appellant's Brief, 4-8.) Specifically, he claims that Kerby lacked the authority to search his backpack—which, as a corollary, tainted his discovery of the drugs. (Appellant's Brief, 4-16.) As a rule, "[a]n appellate court reviews a district court's decision on a motion to suppress using a bifurcated standard." *State v. Chapman*, 305 Kan. 365, 369, 381 P.3d 458 (2016). Specifically, factual findings are reviewed for substantial competent evidence, while the legal conclusions stemming from those findings are subject to unlimited review. 305 Kan. at 369.

Both our state and federal constitutions protect individuals from unreasonable searches and seizures. *State v. Baker*, 306 Kan. 585, 589-90, 395 P.3d 422 (2017). And unless it fits within one of several well-defined exceptions, a warrantless search is presumed unreasonable. 306 Kan. at 590. If evidence is obtained in violation of these long-settled rules, the exclusionary rule frequently applies to bar the admission of that evidence. *State v. Manwarren*, ___ Kan. ___, 440 P.3d 606, 615 (2019).

The exception invoked in this case, search incident to arrest, allows an officer to search the person they are arresting as well as the area within their immediate control. *State v. Ritchey*, 56 Kan. App. 2d 530, 535, 432 P.3d 99 (2018). The purpose of this search is clear: it protects officers from hidden dangers and prevents the suspect from concealing or destroying any evidence they

can reach. 56 Kan. App. 2d at 535. Importantly, however, the search cannot be for random contraband; the evidence that the officer seeks needs to be related to the crime of arrest. See *Arizona v. Gant*, 556 U.S. 332, 343-44, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); *Ritchey*, 56 Kan. App. 2d at 535-36.

In *Ritchey*, this court held that looking through a bag that is outside of the defendant's control after they have been arrested on an outstanding warrant is not a search incident to arrest. 56 Kan. App. 2d at 536-38. There, the defendant had already been handcuffed and separated from her purse at the time the officer searched it. 56 Kan. App. 2d at 537. More to the point, nothing suggested that the arresting officers expected to uncover evidence related to the warrant in the bag. 56 Kan. App. 2d at 536. As such, this court affirmed suppression of the drug evidence uncovered in the illegal search. 56 Kan. App. 2d at 541.

The instant situation is similar. For one, Kerby arrested Thornton on an outstanding warrant. (R. VI, 20.) He never suggested that he believed the backpack contained contraband related to that warrant. Along the same lines, he had already handcuffed Thornton and separated him from his backpack at the time of the search. (R. VII, 7-8; X, 116.) And while Kerby suggested that the backpack inevitably would have been searched at the jail, the fact remains that the State failed to put on any evidence about the jail's search policies. See *Baker*, 306 Kan. at 592-94 (requiring the evidence about inventory policy and procedure to claim inevitable discovery through inventory search). As such, the State concedes that the search incident to arrest exception is inapplicable in this case. The district court needed to grant the motion as it applies to the syringe within the backpack.

The baggie of drugs discovered on the road, however, need not be suppressed. Generally speaking, evidence that is either directly or indirectly obtained as a result of information

obtained from an illegal search needs to be suppressed as fruits of a poisonous tree. *State v. Poulton*, 286 Kan. 1, 5-6, 179 P.3d 1145 (2008). In other words, if evidence is discovered "through exploitation of [an] illegality," it is inadmissible. 286 Kan. at 6. That said, "[e]vidence that is sufficiently distinguishable so as to be purged of the primary taint is not considered fruit of the poisonous tree." 286 Kan. at 6.

Here, Kerby already suspected Thornton of criminal behavior. He had come from the direction of a well-known drug house. (R. VII, 10-11.) More strikingly, he had repeatedly evaded Kerby's attempts to stop him, including maneuvering his bicycle around a mailbox after he had been edged off the road. (R. X, 113-16.) As such, Kerby testified that he always planned on retracing Thornton's route. (R. VII, 13-14.) He had wanted, he explained, to understand why Thornton ran from him. (R. VII, 12-13.) And, importantly, Roberts had already discovered the marijuana pipe—an item that suggested drug possession and use—through legal means. (R. X, 127, 175-76.) In other words, the discovery of the baggie is not a direct or even indirect result of the illegal search of the backpack. Instead, it is a separate and distinguishable event. Suppressing this evidence as fruit of the poisonous tree runs against the purposes of the exclusionary rule. See *State v. Daniel*, 291 Kan. 490, 496, 242 P.3d 1186 (2010) (observing that the rule should only be applied as a deterrent).

In response, Thornton argues that the State tied the drugs too closely to the illegally discovered syringe in closing argument, essentially tainting the entire trial. (Appellant's Brief, 9.) Notably, he cites to no cases suggesting that connecting legally admitted evidence that, in retrospect, needed to be suppressed to the rest of the testimony and exhibits at trial is reversible error. As our Kansas courts frequently observe, merely pressing a point without citation to relevant authority constitutes a failure to reserve it for appellate review. See *State v. Gomez*, 290

Kan. 858, 866, 235 P.3d 1203 (2010). This court is justified in not considering his reversibility argument.

More importantly, however, a close reading of the State's closing refutes Thornton's suggestion that closing argument relied too heavily on the syringe. True, the State pointed to the syringe as circumstantial evidence that the drugs belonged to Thornton. (R. X, 234-38, 240.) That said, the prosecutor consistently lumped the marijuana pipe and syringe together, twin indicators of Thornton's possession of both the drugs and paraphernalia. (R. X, 234-38, 240.) There is no point where the syringe is highlighted as more important than the pipe. Instead, they work together to demonstrate that Thornton dropped the baggie in question. Removing references to the syringe does not eradicate the inference that a person armed with paraphernalia likely has the drugs to match—especially given that the package contained both marijuana and methamphetamine.

Not only that, but the prosecutor highlighted a myriad of other facts that supported Thornton's possession: the location, the condition of the baggie, his body position and riding behavior, his decision to evade Kerby in the first place. (R. X, 240-44.) The handful of references to the syringe, while not insignificant, are not the lynchpin in the State's argument. Even excising each reference results in a compelling and legally sound argument: a baggie, unaffected by the cold and frost of the December night, deposited along the bicycle path of a man who had a marijuana pipe on his person likely belongs to him, especially knowing that he fled from police. Admission of the syringe does not justify reversal of Thornton's convictions in this case.

II. Because possessing multiple pieces of drug paraphernalia is still a single act, a unanimity instruction is not required.

Thornton also asserts that because the State presented evidence of separate pieces of drug paraphernalia—that is, the syringe and the pipe—the district court needed to provide a

unanimity instruction. (Appellant's Brief, 9-11.) Because he failed to request this instruction at trial, the review of this issue is limited to clear error. *State v. Staten*, 304 Kan. 957, 962, 377 P.3d 427 (2016). Under this standard, the appellate court employs two steps. First, it conducts an unlimited review of the record to determine whether the instruction was legally and factually appropriate. 304 Kan. at 962. Second, if the instruction is appropriate, the court considers whether "it is firmly convinced that the jury would have reached a different verdict had the . . . error not occurred." 304 Kan. at 962. As the party challenging the instruction, Thornton carries the burden of proving prejudice. See 304 Kan. at 962.

When a defendant raises a multiple-acts issue, however, our Kansas courts begin with a threshold question: does the case actually involve multiple acts? *State v. Voyles*, 284 Kan. 239, 244, 160 P.3d 794 (2007). If the answer to this question is *yes*, the unanimity instruction is required. See 284 Kan. at 244. Otherwise, the instruction is unnecessary, and Thornton's argument fails. See 284 Kan. at 244.

Generally speaking, a multiple-acts case is one where several different alleged acts or behaviors each support conviction for the crime charged. *State v. Kesselring*, 279 Kan. 671, Syl. ¶ 5, 112 P.3d 175 (2005). If the defendant's conduct is made up of multiple separate and distinct behaviors, then the case is properly categorized as involving multiple acts. 279 Kan. 671, Syl. ¶ 5. If, on the other hand, the defendant's behavior is all part of a single and continuous act, there is no multiple-acts issue. 279 Kan. 671, Syl. ¶ 6. In order to categorize a case in this way, our courts look both the individual facts and the State's theory at trial. *State v. Crossett*, 50 Kan. App. 2d 788, 794, 332 P.3d 840 (2014). Most often, Kansas courts unravel this question by examining four factors: (1) if the alleged acts happened at or around the same time; (2) if they occurred at the same location; (3) if they are causally linked (including whether there is an intervening event

between them); and (4) if a fresh impulse motivates some of the conduct. 50 Kan. App. 2d at 794.

It is well-settled in Kansas that, as a general principle, the possession of multiple pieces of drug paraphernalia does not raise a multiple-acts issue. *State v. Sanborn*, 281 Kan. 568, 570-71, 132 P.3d 1277 (2006); *State v. Schnoover*, 281 Kan. 453, 507-08, 133 P.3d 48 (2006). In *Sandborn*, the defendant raised a similar argument involving the drug paraphernalia in his case. 281 Kan. at 570-71. There, the State actually charged her with both the possession of drug-sale paraphernalia and the possession of drug-use paraphernalia. 281 Kan. at 569-70. Each charge was supported with multiple items of paraphernalia. 281 Kan. at 571. The court determined that the possession of each type of paraphernalia constituted a single act on the defendant's part. 281 Kan. at 570-71. As the court explained: "Although both counts against [the defendant] include multiple items of evidence, they do not include multiple acts because the items are not factually distinct. All of the items are drug paraphernalia." 281 Kan. at 571.

The same result is warranted in this case. It is undisputed that the State presented two separate items of evidence to support the charge in question. But the pipe and the syringe are not factually distinct. Instead, they are both drug paraphernalia, and they simultaneously evidence Thornton's intent to possess such items to ingest drugs. There is no break in time, location, or the impulse surrounding their possession; similarly, the State did not present separate legal theories to support the disparate pieces of paraphernalia. As such, there is no multiple-acts problem, and a unanimity instruction is not required.

More to the point, however, failure to provide the instruction at issue is not reversible. Again, this court needs to consider if it is "firmly convicted that the jury would have reached a different verdict" had they been provided the instruction at issue. *Staten*, 304 Kan. at 962. For unanimity instructions, our Kansas courts frequently consider if it is possible that the jurors

would not have been unanimous on which behavior supported the conviction. See *State v. Allen*, 290 Kan. 540, 545, 232 P.3d 861 (2010).

Here, there is overwhelming evidence concerning both the pipe and the syringe. True, Thornton claimed in closing argument that each piece of paraphernalia had a potentially legal purpose. (R. X, 247, 252-53.) There is very little in the record, however, to support this claim. Kerby and Roberts both testified that in their experience, a pipe like that is used for marijuana. (R. X, 129, 176.) Kerby had never seen that sort of pipe used to smoke tobacco. (R. X, 164.) He even noted that it smelled faintly of burnt marijuana. (R. X, 129.) The same is true for the syringe; again, both officers testified that in their experience, syringes like the one in this case are used for methamphetamine. (R. X, 131, 176-77.) Kerby also highlighted that while there are many other uses for syringes in general, having a standalone syringe in a backpack without any associated medication suggests drug use. (R. X, 157-58.) As such, it is highly unlikely that any member of the jury would have found a legitimate use for either piece of evidence. Instead, it is much more probable that the jury believed both theories of the case beyond a reasonable doubt.

And because both instances are supported by overwhelming evidence, there is no need to reverse based on the need to suppress the syringe. The paraphernalia conviction can stand based solely on Thornton's possession of the pipe. There is no need for reversal in this case.

CONCLUSION

The officer lacked authority to search Thornton's backpack incident to arrest. But the drug evidence is not fruit of that poisonous tree, and reversal is not warranted simply because the syringe needed to be suppressed. Similarly, possessing multiple instances of drug paraphernalia is a single continuous act, and the issues with the syringe do not require a new trial on the paraphernalia conviction. As such, the State respectfully requests Thornton's convictions be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 18, 2019, I sent a copy of the foregoing brief to Derek Schmidt, Attorney General, Solicitor Division, for approval and filing, as well as e-mailing a copy to:

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