IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM D. HIBDON,	)	
	)	Not for Publication
Appellant,	)	
v.	)	Case No. F-2008-1043
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

William D. Hibdon was tried by jury and convicted of Count I, Endeavoring to Manufacture Methamphetamine in violation of 63 O.S.2001, § 2-408; Count II, Possession of a Firearm after former felony conviction in violation of 21 O.S.Supp.2007, § 1283; and Count III, Possession of Drug Paraphernalia in violation of 63 O.S.Supp.2004, § 2-405, in the District Court of Grady County, Case No. CF-2008-65. In accordance with the jury's recommendation the Honorable Richard G. Van Dyck sentenced Hibdon to thirty (30) years imprisonment (Count I); one (1) year imprisonment (Count II); and credit for time served on Count III. The sentences in Counts I and II run consecutively. Hibdon appeals from these convictions and sentences.

Hibdon raises one proposition of error in support of his appeal:

I. The trial court's denial of Hibdon's Motion to Suppress the Evidence and Dismiss the Charge denied Hibdon's rights under the Fourth Amendment to the United States Constitution and Article 2, Section 30 of the Oklahoma Constitution.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find the

case must be reversed and remanded. Officers received information suggesting that Hibdon was manufacturing methamphetamine several hours before they went to his house. Once there, they smelled an odor of ether suggestive of methamphetamine manufacture, arrested Hibdon outside the house, and secured the area. Rather than obtain a search warrant one officer thoroughly searched the house, without Hibdon's consent, after his arrest. Officers had sufficient evidence and ample time to secure a search warrant.[1]

The public safety exigent circumstances exception to the Fourth Amendment warrant requirement does not apply here.[2] Hibdon's house was in a rural area and nobody else was present at the time of his arrest. While officers smelled an odor indicating an apparently dangerous concentration of ether, no evidence suggests that there was any danger to the public from the volatile chemicals which might have been present, or that persons in the area were in danger from those chemicals.[3] No other exception to the warrant requirement applies. The trial court should have sustained Hibdon's motion to suppress the evidence.[4]

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[1] The State admits that officers "already had plenty of evidence to support a warrant before they entered the defendant's house." Appellee's Brief at 10.

[2] *Coffey v. State*, 2004 OK CR 30, 99 P.3d 249, 252. Evidence must show: (a) an odor indicating the presence of an apparently dangerous concentration of ether or another chemical commonly used in the manufacture of methamphetamine; (b) that the reporting officers were aware of the volatile and explosive nature of the chemicals and the potential danger to the public; and (c) the possibility that persons in the area might be in danger from the chemicals.

[3] *Coffey*, 99 P.3d at 252.

Decision

The Judgments and Sentences of the District Court are **REVERSED** and **REMANDED** for further proceedings. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, J.

C. JOHNSON, P.J.:	CONCUR
A. JOHNSON, V.P.J.:	DISSENT
LUMPKIN, J.:	DISSENT
LEWIS, J.:	CONCUR

[4] While we defer to the trial court's factual findings unless they are clearly erroneous, we review *de novo* the question of law regarding the legality of the search. *Seabolt v. State*, 2006 OK CR 50, 152 P.3d 235, 237.

A. JOHNSON, VICE PRESIDING JUDGE, DISSENTING:

In reviewing the denial of Hibdon's motion to suppress the evidence found during a search of his house, we defer to the lower court's findings of fact, unless clearly erroneous, and review *de novo* the ultimate question of the legality of the search.

In this case, the magistrate judge concluded as a matter of fact that the initial entry into Hibdon's house was the action of a single officer who did an abbreviated sweep of the house, based upon the smell of ether emanating from inside and his knowledge of the dangerous volatility of that substance. That finding was well supported by the testimony of the two law enforcement officers first on the scene.

Nothing in the record supports the contrary finding of fact by the majority, that the officer "thoroughly searched the house." The magistrate judge found the initial sweep was reasonable under those exigent circumstances and concluded as a matter of law that the initial entry and limited search was constitutionally valid. (See Appendix A, consisting of a partial summary of facts and conclusions of law by the trial court, attached.)

I agree and would affirm the judgment of the trial court.

APPENDIX A

The Honorable Timothy Brauer, Special Judge
District Court, Grady County, Case No. CF-2008-65
State of Oklahoma v. William David Hibdon
Preliminary Hearing, June 13, 2008
Tr. p. 168, line 23 through p. 172, line 15

I think there's a couple of issues today that I will address briefly. Number one, I'll go back to the initial scene. The evidence presented at that time, that a citizen reported a suspicious package or a bag. On further investigation, there was testimony presented that that was possibly a propane tank modified for the use of obtaining and retaining anhydrous ammonia, that the officers visited with two to three individuals regarding that. They were given some specific information that the intended purpose of that was to take anhydrous ammonia over to the defendant's home, William David Hibdon. Granted, that would be the basis for the officer going to that location to further the investigation.

They drive by, get the location, they return. I believe the testimony was that while they were in the roadway, the defendant approached the vehicle. They did not enter the property. That they visit with the vehicle while they – or the individual, the defendant, Mr. Hibdon.

While they were visiting with him, two witnesses testified today that there was an odor of ether. The first witness that testified, Deputy Berryhill, said that he was familiar with the smell of ether through his experience as far as motor vehicle maintenance, and that he also knew that ether was used in the manufacture of methamphetamine. They testified that it was coming from the direction of the residence.

Deputy Laffoon also testified a little more specific that Deputy Berryhill that not only was it coming from the residence, but he detected that that was coming from the person of Mr. Hibdon.

Now, so the question becomes at this point, what's the next step? The testimony was that there was a consent – or request for consent to search, which was denied by the defendant, and when that was done, then Deputy Laffoon chose at that point in his mind that he believed there was sufficient evidence before him to request a search warrant. He then attempted, according to the testimony, and I think this was both Deputy Berryhill and Deputy Laffoon, that ultimately they secured the residence.

Now, Deputy Berryhill did provide testimony in court today that ether is volatile, it is a dangerous substance, and there were instances he hadn't used ether because it was so volatile. Granted, Deputy Laffoon did not provide that for a reason, but was concerned about officers' safety.

Now, if a person is suspected of manufacturing methamphetamine and you're attempting to secure a residence, which you've had some information that there are people that go in and out – obviously we don't know if that's

necessarily true at the time, but they were directed to the house regarding the manufacture of methamphetamine and there was some evidence present, particularly the smell of ether, that corroborated the initial information provided to them by the three other parties by the railroad tracks.

So I think that under the Fourth Amendment, at that particular point, it would not be unreasonable, if there's going to be an officer stationed at this residence pending the acquisition of a search warrant, to check the residence to ensure that there are no individuals in the house that could bring harm to any officers that remain at the location, and further that – consistent with Deputy Berryhill, that there's no people in the residence that could be harmed by the odor of the ether. The U.S. Supreme Court has sanctioned an exception to the search warrant requirement under certain circumstances.

So at that particular point, the testimony was that there was just a cursory check of the residence for persons. There's no evidence before the Court that that search extended anything beyond the check for individuals. Once the house was cleared, then the information for the search warrant was typed up and presented to the District Judge, who at that time reviewed it and determined there to be probable cause.

I have reviewed the exhibits, and at this particular time, I believe that as far as the initial entry into the house, I don't think that's unreasonable under the Fourth Amendment, given the circumstances and given the testimony that was provided to the Court at this time. And I believe even under Terry vs. Ohio and there's been several other pronouncements, both in the Oklahoma Court of Criminal Appeals and the United States Supreme Court, that even if an officer has reasonable suspicion that a crime is or is about to be committed, then they can take reasonable steps to protect themselves from any potential danger.

And the testimony presented to the Court today, at least a cursory review of the residence to make sure there was no one there that could harm officers, who were going to be posted pending the acquisition of a search warrant, I do not think violates the unreasonableness provision of the Fourth Amendment or the Oklahoma Constitution, and that the subsequent acquisition of a search warrant that was approved by the District Judge did satisfy the requirement of the Fourth Amendment at that particular point.

LUMPKIN, JUDGE: DISSENT

As one who believes in the Rule of Law and the need for consistency in order to provide the trial bar and judges with the direction they need to fulfill their roles in our judicial system, I am disturbed when the Court fails to follow precedent. Because the majority seeks to cherry pick its way around the need to apply precedent in order to achieve a desired result in this case, I must respectfully dissent.

This Court adopted the public safety exigent circumstance exception in *Coffey Jr. v. State*, 2004 OK CR 30, ¶ 6, 99 P.3d 249, 252. The officer in this case complied with that precedent. He had probable cause based on the smell of ether coming from the home that a "potential danger to the public" existed or that there was a "possibility that persons in the area might be in danger". *Id.* I believe the smell of ether coming from the home, and the smell of ether on Appellant, met the public safety exigent circumstance which justified a walk through of the home to confirm the presence of the dangerous items and ensure other persons were not at risk. The items observed in plain view during that walk-through, when coupled with the probable cause that already existed,[1] were more than sufficient to support the validity of a search warrant. The officers secured the area and presented their evidence to a magistrate who found it sufficient for the issuance of a search warrant. The evidence seized

[1] The officer had already received information from an informant that the informant was to deliver anhydrous ammonia to Appellant so he could make methamphetamine, and had discovered a propane tank configured to be used to steal anhydrous ammonia.

pursuant to that warrant was admissible and the denial of the Motion to Suppress was proper.

The majority has now created a "moving target" which will only result in confusion within the law enforcement community as they endeavor to comply with the law of search and seizure. The majority uses after the fact knowledge to judge the contemporaneous actions of the officers. At the time of the walk-through, the officers did not know whether there was anyone else in the house and they could not be sure without the walk-through. At the time of the walk-through, they fully complied with the *Coffey, Jr.* exception, and did nothing more than what was required to ensure the protection of any persons who might be affected by the dangerous presence of a meth lab.

While the officers knew they were in a rural area, that factor was not present in the *Coffey, Jr.* exception. The question now raised is whether this Court is going to continue to add little nuances to this exception on a case by case basis to preclude officers who are trying to do the right thing from being able to ever comply in a scenario where the Court does not like the result.

Further, the majority stops short of completing its review of the validity of the search warrant. In this case there was sufficient independent evidence, after excluding the plain view evidence observed during the walk-through, to sustain the warrant that was obtained. Since the warrant was validated by independent evidence showing probable cause at the time the warrant was issued by the magistrate, the Motion to Suppress should still have been denied and the judgment and sentence affirmed.

In *Wackerly v. State*, 2000 OK CR 15, ¶ 12-14, 12 P.3d 1, 8-9, this Court relied on *Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978), in stating:

> In *Franks v. Delaware*, the Supreme Court held that an affidavit supporting a factually sufficient search warrant may be attacked upon allegations that the affidavit contained deliberate falsehoods or reckless disregard for the truth. However, if when the inaccuracies are removed from consideration there remains in the affidavit sufficient allegations to support a finding of probable cause, the inaccuracies are irrelevant. . . . "To determine this issue, we ask whether the warrant would have been issued if the judge had been given accurate information."

2000 OK CR 15, ¶ 13, 12 P.3d at 8 (internal citations omitted).

See also Matthews v. State, 2002 OK CR 16, ¶ 22-26, 45 P.3d 907, 917-18. I submit the information from a named informant, together with the smell of ether on Appellant and emanating from the residence, was sufficient evidence for the probable cause necessary to validate the warrant in this case.

Additionally, even if the walk-through was improper, the U.S. Supreme Court has found this type of action does not violate a privacy interest, but only a possessary interest, and is not unreasonable under the Fourth Amendment. When the warrant obtained by the law enforcement officers is supported by an independent source, e.g. informant testimony confirmed by sight and smell, there is no reason why the evidence should be suppressed. *See Segura v.United States*, 468 U.S. 796, 104 S.Ct. 3388, 82 L.Ed.2d 599 (1984); *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). Thus, the items would have been inevitably discovered and the warrant, together with the items seized, should be validated and the judgment and sentence should be affirmed.

See Pennington v. State, 1995 OK CR 79, 913 P.2d 1356, 1367 (adopting the inevitable discovery rule of *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377).