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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 10-1244

THOMAS SMITH, JR. APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered September 14, 2011 APPEAL FROM THE DREW COUNTY CIRCUIT COURT, NO. CR-2009-0119-1 HONORABLE SAMUEL B. POPE, JUDGE AFFIRMED.

WAYMOND M. BROWN, Judge

Appellant Thomas Smith, Jr. was convicted in Drew County Circuit Court of possession of drug paraphernalia with intent to manufacture methamphetamine, a Class B felony, and being a felon in possession of a firearm, a Class D felony. He was sentenced to a term of five years' imprisonment and a $500 fine. On appeal, he contends that the trial court erred (1) by denying his motion to suppress certain statements he made to a law enforcement officer while in custody; and (2) by admitting a sealed prior felony conviction into evidence. We affirm.

Factual Background

On June 12, 2009, a group of police officers and agents from the 10th Judicial Drug Task Force executed a search warrant for illegal drugs and evidence related to the manufacture of methamphetamine on a residence in Drew County. One officer testified that he believed

the residence belonged to appellant. Another officer was personally familiar with the appellant, "knew" Smith lived there, and testified that the officers believed as a group that it was the appellant's house. During the search of the house and grounds, the officers found a number of items used in the manufacture of methamphetamine, including a recipe for the drug, camp fuel, iodine crystals and a t-shirt with iodine stains, chopping devices and blenders, coffee filters, bags with white residue, burned rags, tubing, and what appeared to be an HCL generator. Officers also testified that they saw mail addressed to the appellant, an order regarding the sealing of a prior conviction record, and a homemade name tag that read "Professor Thomas W. Smith, Jr., Doct. in Org. Chem."

The officers testified that at some point after finding these items, a truck with "Thomas Smith Pest Control" on the side slowed down at the head of the driveway and began to turn in, then hesitated and resumed driving down the road. The two officers who witnessed this saw the appellant's father driving and the appellant sitting in the back seat. They followed the truck in their patrol car, pulled the truck over, and searched the vehicle. A bag containing syringes and several other possibly drug-related items were found on the seat next to the appellant. These items were seized, and the appellant was placed under arrest and taken back to the residence while the search continued.

The supervisory agent, Jason Akers, testified that he later heard the appellant beating or kicking at the inside of the door of the patrol car. When Akers went to check on him the appellant said, "I'm caught red-handed, there ain't no point in lying" and, "Man, I got a lab out here and I'll take you to it and show it to you because y'all got me. Ain't no point in

hiding it." Akers testified that as the appellant made these statements, he pointed with his head toward a wooded area behind the house. Akers then became concerned because the appellant was slurring his words and behaving as if he had ingested a drug. Akers found an empty Xanax bottle in the appellant's pocket and called for an ambulance, and the appellant was taken to the hospital. Akers testified that he and the other officers tried but were unable to find the lab in the woods referred to by the appellant.

Analysis

I. Motion to Suppress

Appellant claims that his motion to suppress should have been granted because there was no probable cause for his arrest. We disagree.

In reviewing a circuit court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court.[1] The credibility of witnesses who testify at a suppression hearing is for the trial judge to determine, and this court defers to the superior position of the trial judge in matters of credibility.[2] The reviewing court will only reverse if the trial court's findings are clearly erroneous.[3]

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[1]*Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004).

[2]*Id.*(citing *Jones v. State*, 344 Ark. 682, 42 S.W.3d 536 (2001)).

[3]*Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000) (citing *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999)).

A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that the person has committed a felony.[4] Reasonable, or probable, cause is defined as "facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected."[5] Probable cause is determined by the officer's knowledge at the time of the arrest.[6] A warrantless arrest by an officer not personally possessed of information sufficient to constitute reasonable cause is valid where the arresting officer is instructed to make the arrest by a police agency which collectively possesses knowledge sufficient to constitute reasonable cause.[7] Constitutional standards permit common sense, honest judgments by police officers in their probable-cause determinations.[8]

Here, law enforcement officers testified that they personally believed or knew that the property to be searched under the warrant was the residence of the appellant, and found mail addressed to him, a court order from a case involving him, and a handwritten name tag reading "Professor Thomas W. Smith, Jr., Doct. in Org. Chem." in addition to numerous items connected with the manufacture of methamphetamine. The officers further testified that these items were found *before* the appellant was seen driving by the residence and that they

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[4]Ark. R. Crim. P. 4.1(a)(i).

[5]*Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002).

[6]*Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986).

[7]Ark. R. Crim. P. 4.1(d).

[8]*Sanders v. State*, 259 Ark. 329, 532 S.W.2d 752 (1976).

communicated with one another during the search as to what items were being found. In addition, the arresting officer testified that the appellant and his parents began to pull into the driveway but changed course and drove off as soon as they saw that law enforcement was there. These facts and circumstances were sufficient to permit a person of reasonable caution to believe that the appellant had committed a felony. Appellant's arrest was valid, and the trial court did not err in denying his motion to suppress his statements and the items found in his possession at his arrest.

II. Prior Expunged Conviction

In 2005, the appellant was convicted of felony possession of drug paraphernalia. He pled guilty and was put on probation, but he violated the terms of his probation and was given a year in prison and thirty-six months of probation. When the appellant completed those terms, an order to seal the record of this offense was entered. For his second point on appeal, the appellant contends that the trial court erred by admitting his prior conviction into evidence as proof on the charge of possession of a firearm by a felon (FIP).

The order sealing the record of this appellant's prior offense stated that the order was entered pursuant to Ark. Code Ann. § 16-90-1201, which provides that the record "shall" be expunged, but that the procedure, effect, and definition of "expungement" shall be in accordance with that established in § 16-90-901 to 906. The relevant statute, § 16-90-902(a) provides that an individual whose record has been expunged "shall have all privileges and rights restored and shall be completely exonerated, and the record which has been expunged shall not affect any of his or her civil rights or liberties *unless otherwise specifically provided by*

law." (Emphasis added.) The clean-slate effect of expungement is not absolute: if specifically provided by law, an expunged criminal record can affect an individual's civil rights or liberties.[9] The State contends, and we agree, that § 5-73-103(a)(1) specifically provides that the appellant's expunged felony conviction could be used as proof on his FIP charge.

Arkansas Code Annotated § 5-73-103 prohibits a person who has been convicted of a felony from possessing a firearm,[10] and a determination of guilt by a jury or court that the person committed a felony constitutes a conviction, even if the court suspended imposition of sentence or placed the defendant on probation. The statute exempts anyone who is granted a pardon by the governor of Arkansas.[11] An amendment to the statute effective July 31, 2009 created another exception, providing that the "determination of guilt" provision does not apply to a person whose case was dismissed and expunged under Ark. Code Ann. § 16-93-301 *et seq*. or § 16-98-303(g).[12] However, no other exceptions were created. Most persuasively, Act 595 of 1995 amended § 5-73-103 to include that "[a] determination by . . . a court that a person committed a felony shall constitute a conviction even though the person . . . had his conviction expunged pursuant to any act, or was entitled to have his conviction expunged

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[9]*Jones v. Huckabee*, 369 Ark. 42, 250 S.W.3d 241 (2007).

[10]Ark. Code Ann. § 5-73-103 (a)(1).

[11]Ark. Code Ann. § 5-73-103(d).

[12]That exception is inapplicable here because it became effective after the appellant's offense occurred, and because the appellant was neither sentenced under nor had his conviction expunged under § 16-93-301 *et seq*. or § 16-98-303(g).

pursuant to any act."[13] Although still uncodified, this provision of the Act indicates legislative intent for an expunged felony conviction to remain a conviction for the purposes of FIP. Accordingly, we affirm.

Affirmed.

PITTMAN and GLADWIN, JJ., agree.

John F. Gibson, Jr., for appellant.

Dustin McDaniel, Att'y Gen., by: *Rachel Hurst Kemp*, Ass't Att'y Gen., for appellee.

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[13]1995 Ark. Acts, No. 595, § 1. *See also State v. Ross*, 344 Ark. 364, 39 S.W.3d 789 (2001) and *State v. Warren*, 345 Ark. 508, 49 S.W.3d 103 (2001), wherein the Arkansas Supreme Court recognized the effect and intent of Act 595 but held it inapplicable to individuals who were sentenced before the Act became effective (not the case here: appellant was sentenced well after the Act was passed).