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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-000099-MR

DENIA ANTONETTE GATESKILL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CR-00906-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE AND McANULTY, JUDGES; AND JOHN WOODS POTTER,
SPECIAL JUDGE.¹

POTTER, SPECIAL JUDGE. Denia Antonette Gateskill appeals from a conditional guilty plea alleging that the trial court erred by denying her motion to suppress evidence and statements given to police following her detention and arrest on drug-related offences. Gateskill also contends that the trial court erred by

¹ Senior Status John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

denying her motion to disclose the identity of a confidential informant. Having reviewed the arguments of the parties and the record, we affirm.

On August 28, 2001, Gateskill was indicted for first-degree trafficking in a controlled substance (KRS 218.1412); first-degree promoting contraband (KRS 520.050); possession of drug paraphernalia, second offense (KRS 218A.500); and possession of marijuana (KRS 218A.1422). Her codefendant, Demetres D. Hayes, was indicted on various drug-related offenses in the same indictment. The charges resulted from the execution of a search warrant at Gateskill's Lexington residence on July 10, 2001.

Gateskill subsequently filed motions to suppress evidence and statements given to police following her detention and arrest. Gateskill also moved that the Commonwealth be required to disclose the identity of a confidential informant used by the Commonwealth in its investigation of drug activity at the Headly Avenue residence.

In the meantime, Gateskill's codefendant, Hayes, made similar motions to suppress. On October 24, 2001, the trial court held a suppression hearing on the codefendants' motions. The Commonwealth called only one witness to testify, Detective Jack Dawson of the Lexington Police Department's Narcotics Unit. Following is a summary of his suppression hearing testimony.

On July 4, 2001, Dawson received information from an unknown caller claiming that he had recently bought property across from 666 Headly Avenue and that there was a great deal of foot traffic leading in and out of that address. Dawson and other members of the Narcotics Unit did drive-by surveillance of the location over the next few days. On July 10, 2001, Dawson and Detective Byron Smoot surveilled the address for about forty minutes between 8:30 and 9:30 p.m.

Shortly before obtaining the search warrant, Dawson had sent a qualified confidential informant into 666 Headly Avenue to attempt to purchase drugs. The informant subsequently returned with a quantity of drugs and stated that he had purchased the drugs at the Headly Avenue address from a bald, black man in his forties who answered to "Demetrius." Dawson obtained the search warrant at 11:11 p.m. on July 10, and the search warrant was executed at 11:49. The warrant permitted a search of 666 Headly Avenue and "Demetrius (LNU)."

Dawson and other members of the narcotics unit approached the home on foot and, as they were arriving, they observed Gateskill leaving the home. Based upon information received from his confidential informant, Dawson knew that the house was Gateskill's residence, and he therefore decided to stop and detain her. The stop and detention occurred on the sidewalk in front of the residence.

At about the same time, Hayes exited the residence, and was likewise detained. Gateskill and Hayes were then returned to the residence where Dawson read them the contents of the search warrant and informed them of their Miranda rights. Dawson recited the Miranda warnings by memory as follows: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney, and if you can not afford one, the courts will appoint one for you." After reciting the Miranda warnings, Dawson asked Hayes and Gateskill if they understood those rights and they nodded affirmatively.

Within the house, the detectives found cocaine, marijuana, and various drug paraphernalia. No contraband was located on either Gateskill or Hayes; however, it was subsequently discovered that Gateskill had transported marijuana into the jail following her arrest. After approximately forty-five minutes at the house, the officers took Gateskill and Hayes to the police station to interview them. Dawson interviewed Gateskill first, and then Hayes. During the interviews, Dawson did not reiterate their Miranda rights to either defendant, but simply asked if they remembered him telling them their rights at the scene and asked if they understood those rights.

On October 26, 2001, the trial court entered an order denying both Gateskill and her codefendant's motions to

suppress. Gateskill subsequently entered a conditional guilty plea under which she pled guilty to the charges as listed in the indictment. Under the agreement, Gateskill received a total sentence of seven years, but reserved the right to appeal the trial court's suppression rulings. On December 12, 2001, the trial court entered final judgment pursuant to the plea agreement, but suspended imposition of the sentence and placed Gateskill on probation for a period of five years.

First, Gateskill contends that the trial court erred in denying her motion to suppress on the basis that she was illegally seized and detained on the night of the search warrant. We disagree.

It is uncontroverted that as the police were moving in to execute the search warrant, Gateskill had left the residence and was on the public sidewalk adjacent to the residence. According to Gateskill, all that police knew about her was that she was observed leaving the Headly Avenue residence and preparing to get into a waiting car. According to Gateskill, pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), police had an insufficient basis to stop and detain her.

The suppression hearing testimony discloses that the police knew more about Gateskill than she claims; however, in any event, Terry v. Ohio is not the controlling case. Gateskill

overlooks the fact that when she was detained, the police were in the process of executing a search warrant on her residence. Under these circumstances, Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) is the controlling case. The facts in Summers are substantially the same as in this case. In Summers, as the police moved in to search the defendant's residence, he was observed leaving the house and proceeding across the porch and down the steps.

Summers held that "for Fourth Amendment purposes . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Summers, 452 U.S. at 705, 101 S.Ct. at 2595, 69 L.Ed.2d. at 351. The Court further stated that "[w]e do not view the fact that respondent was leaving his house when the officers arrived to be of constitutional significance. The seizure of respondent on the sidewalk outside was no more intrusive than the detention of those resident of the house whom police found inside." Summers, 452 U.S. at 702, 101 S.Ct. at 2594, 69 L.Ed.2d. at 349.

Pursuant to Summers, the police seizure of Gateskill on the public sidewalk and the subsequent detention of her at the residence while the search warrant was being executed was not a violation of the Fourth Amendment. Moreover, Section 10 of the Kentucky Constitution provides no greater protection than

does the federal Fourth Amendment. Hause v. Commonwealth, Ky. App., 83 S.W.3d 1, 11 (2001). The trial court did not err in holding the seizure and detention was permissible.

Next, Gateskill contends that the Miranda warnings given to her by Dawson at the Headly Avenue residence was deficient. Specifically, Gateskill alleges that the warning given failed to clearly inform her that "she has the right to consult with a lawyer and to have the lawyer with her during interrogation." The Miranda warnings as recited to Gateskill and her codefendant at the residence were as follows:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney, and if you cannot afford one the court will appoint one for you.

As alleged by Gateskill, she and her codefendant were not explicitly told that they had a right to consult with an attorney prior to questioning and to have a lawyer present during questioning. Neither were they told that they could stop the questioning at any time. While someone in custody undoubtedly has these rights, Gateskill does not cite us to a case holding that the failure to advise someone in custody of these rights serves as grounds for suppressing a subsequent statement, and we are unable to find authority supporting this proposition. The central holding in Miranda was stated as follows:

[W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. (Emphasis added.)

Miranda 283 U.S. 436, 478 - 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694, 726 (1966).

We are persuaded that Gateskill was given a proper Miranda warning, and that the trial court did not err by overruling her motion to suppress under the theory that she was not specifically told that she had a right to consult with an attorney prior to questioning and/or to have an attorney with her during questioning.

Finally, Gateskill contends that the trial court erred by overruling her motion to require the Commonwealth to disclose the identity of the confidential informant who made the controlled drug-buy at the Headly Avenue residence shortly before the search warrant was obtained. We disagree.

In addition to the other information obtained from the informant, the informant also told the police that he or she was "familiar" with Gateskill and that Gateskill rented the Headly Avenue residence. At the suppression hearing Dawson indicated that Gateskill was observed leaving the apartment earlier in the evening and at the time they executed the search warrant, and that he relied on this information to decide to stop and detain Gateskill when they encountered her on the sidewalk.

The Commonwealth has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer. Kentucky Rules of Evidence (KRE) 508(a). Gateskill was entitled to the informant's identity only if it appears that the informant "may be able to give relevant testimony." KRE 508(c)(2). Further, in Schooley v. Commonwealth, Ky., 627 S.W.2d 576 (1982), the Supreme Court held that a defendant seeking disclosure must make an affirmative showing that disclosure would be relevant and helpful to the defense. Id. at 578; see also McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967).

In the case before us for decision, Gateskill has failed to make an affirmative showing that disclosure would be relevant and helpful to the defense. The trial court had the opportunity to evaluate the affidavit and determine whether

disclosure of the informant's identity was necessary. Gateskill has not demonstrated that the trial court erred in prohibiting disclosure. "Mere speculation that identity of an informant is necessary to a defense is not enough." Schooley at 578.

For the foregoing reasons the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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