

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000101-MR

GLEN L. BOWERSMITH

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NOS. 00-CR-00070 AND 01-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * *

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Glen Lee Bowersmith ("Bowersmith"), appeals the trial court's denial of his motion to suppress evidence seized in a search of his business premises.

Bowersmith entered a plea of guilty on the charges, with the condition that he be permitted to appeal the denial of the motion to suppress. We reverse the trial court's denial of Bowersmith's motion to suppress.

Bowersmith was a bookstore owner and operator. He was

the individual with sole possession and control of his business premises. A person indicating that he was a customer of Bowersmith's business claimed to have lost his wallet in the store, and requested permission to search for it. Bowersmith granted the customer permission to search those areas of the store frequented by customers. The individual did not find his wallet. Later that day, a police officer came to the store and asked Bowersmith for permission to search the store for the lost wallet. Bowersmith asserts that he gave the officer his oral consent to search for the wallet in the floor area, but not behind the counter of the business. The counter and space behind it were areas to which customers were denied access. Bowersmith had personal items behind the counter. No goods for sale or items of interest to customers were behind the counter.

The record reflects that there were no witnesses to Bowersmith's limited oral consent to search other than the officer and Mr. Bowersmith. The officer requested that Bowersmith sign a consent form permitting him to search for the wallet. Bowersmith did so. The consent to search form was unrestricted, and did not detail the areas of the store to be searched. Bowersmith did not add any restrictions or make any comments on the consent to search form.

During the search, the officer began to go behind the counter. Bowersmith told him that he did not have consent to

search behind the counter. Witnesses to the exchange confirmed that Bowersmith informed the officer that he could not search behind the counter, and that Bowersmith informed the officer that no customer had access to the area behind the counter. The officer ignored Bowersmith's statement, and began to search in various closed and zippered bags and pouches behind the counter. At trial witnesses testified that Bowersmith repeatedly informed the officer that he could not go behind the counter to search and asked him to cease, but that the officer continued to conduct his search behind the counter in the business.

The officer located illegal substances in a closed bag behind the counter. He then arrested Bowersmith and left the store. The next day, the police obtained a search warrant for the premises based on the substance found in the earlier search. All illegal substances found during the initial search and the search pursuant to the search warrant were admitted into evidence by the trial court over defense objection.

The trial court ruled that regardless of any verbal exclusion to the consent to search, the form granting the police permission to search the premises had no exclusions on it, and therefore, Bowersmith could not object to any search.

Bowersmith argues that an owner may rescind permission to search his property, even after consent was initially given for the search. See: Commonwealth v. Fox, Ky., 48 S.W.3d 24, 27 (2001).

In that case, the defendant gave an oral consent to a search of the cab of his vehicle, but moved one bag to the back of the truck to remove it from the ambit of the consensual search. The Kentucky Supreme Court held that Fox's conduct was a clear and permissible withdrawal of any consent to search that bag Id., at 27.

In the present case Bowersmith's oral request that the officer not go behind his counter was a clear revocation of any presumed consent to search behind the desk. Bowersmith had a reasonable expectation of privacy in that portion of the premises barred to customers, and exercised clear dominion and control over that area. Express consent to search is required for such areas. Foley v. Commonwealth, Ky., 953 S.W.2d 924, 934 (1997). A careful scrutiny of the circumstances shows that Bowersmith's oral revocation of any presumed consent was sufficient to rescind the consent form. Cook v. Commonwealth, Ky., 826 S.W.2d 329, 331 (1992). The scope of consent is one of objective reasonableness, and requires a showing that an ordinary person would have understood the scope of the consent given. Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). Bowersmith acted in such a clear and obvious way as to indicate that he was withdrawing his consent to the search.

The Commonwealth has the burden of proving that the

search was consensual. Colbert v. Commonwealth, Ky., 43 S.W.3d 777 (2001). The Commonwealth that the consent to search form signed by Bowersmith was sufficient to meet this burden. The trial court held that the Commonwealth's submission of the executed written consent to search was sufficient to prove that the search was consensual. Bowersmith's initial consent was withdrawn when the officer attempted to enter restricted personal areas in the business premises. For the foregoing reasons, we reverse the trial court's denial of the motion to suppress evidence obtained in the area of the establishment to which Bowersmith denied access.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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