

RENDERED: April 11, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-000202-MR

BENJAMIN R. SMITH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 01-CR-00786

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE¹

POTTER, SPECIAL JUDGE: Benjamin R. Smith appeals from a conditional guilty plea alleging that the trial court erred by denying his motion to suppress statements given to police immediately following his arrest on suspected drug trafficking charges. Benjamin contends that the statements were made prior to his being given Miranda warnings by the arresting officer.

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

Having reviewed the arguments of the parties and the record, we affirm.

On July 24, 2001, Smith was indicted for the selling/transferring of a simulated controlled substance, second offense, Kentucky Revised Statutes (KRS) 218A.350, and first-degree persistent felony offender, KRS 532.080. The charges resulted from the sale of simulated crack cocaine to undercover police officers on June 19, 2001.

On September 14, 2001, Smith filed a motion for a hearing to determine whether any or all evidence in the case should be suppressed. As grounds for the motion, Smith alleged that any statements he made to police at the time of his arrest were in violation of the Fifth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution because he had not been given Miranda warnings prior to making the incriminating statements.

A suppression hearing was held on October 10, 2001. Following the hearing, the trial court entered an order denying Smith's motion to suppress.

On November 19, 2001, Smith filed a Waiver of Further Proceedings with Petition to Enter Plea of Guilty. The plea was conditioned on his right to appeal the trial court's denial of his suppression motion. The trial court accepted the

appellant's conditional guilty plea and sentenced him to a total of ten years imprisonment. This appeal followed.

Smith contends that the trial court erred by not suppressing the incriminating statements he made at the time of his apprehension on the basis that the statements were made in violation of his Miranda rights. We disagree.

At the suppression hearing, the Commonwealth called one witness, Officer Brian Smoot, the arresting officer. Smoot testified that on the evening of June 19, 2001, he and two partners were working as the surveillance team for undercover buy-bust transactions in the Georgetown Street area of Lexington. Following one such transaction, Smoot's team got the go-word, and moved in. One of the suspects complied with police instructions to remain at the scene, but another, later identified as Smith, attempted to run away. Smith was pursued by Smoot, apprehended, and cuffed. At the time he was apprehended, Smith was in possession of the buy-money.

Smoot testified that he handcuffed Smith and immediately thereafter read him his Miranda warnings pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Afterwards, Smith made statements to the effect that whatever he got, he got from his juvenile partner in the sale, presumably meaning that Smith was involved in the transaction, but that the juvenile supplied the "drugs" and/or gave him the

buy-money. Officer Smoot reiterated that he had given Smith his Miranda warnings prior to any questioning and prior to any statement being made by Smith.

Smith was called as the only witness for the defense. Smith denied that he had been given Miranda warnings at the time of his arrest, and insisted that he had not been read his rights until he was transported to the police station. Smith acknowledged that he had made incriminating statements at the time of his arrest. Thus Smith's testimony directly contradicted Officer Smoot's testimony regarding whether Smith had been given Miranda warnings prior to making incriminating statements.

In summary, the standards governing custodial interrogation of a criminal suspect are that, prior to police questioning, the suspect must be informed that he has a right to remain silent; that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed; however, the suspect may waive these rights if the waiver is made voluntarily, knowingly and intelligently. Miranda v. Arizona, supra; Combs v. Commonwealth, Ky., 438 S.W.2d 82, 83 (1969). The warnings required under Miranda are concerned with "the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation."

Fields v. Commonwealth, Ky. 12 S.W.3d 275, 283 (2000)(citing Miranda v. Arizona, 384 U.S. at 477, 86 S.Ct. at 1629).

Kentucky Rules of Criminal Procedure (RCr) 9.78 provides the procedure for conducting hearings on suppression motions, as well as the standard for appellate review of the trial court's determination:

"If ... a defendant moves to suppress ... the admission of ... a confession or other incriminating statements alleged to have been made by him to police authorities, ... the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive."

When examining a circuit court's ruling on a suppression motion, our standard of review has two components: "First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law." Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376, 380 (2000).

In this case there was conflicting testimony regarding whether Smith was given his Miranda warnings prior to making the incriminating statements. The Circuit Court accepted Officer

Smoot's testimony over Smith's. It was the function of the Circuit Court to resolve the conflicting testimony, and Officer Smoot's unequivocal testimony that he gave Smith Miranda warnings prior to Smith's incriminating statements is substantial evidence supporting the Circuit Court's finding. As the Circuit Court's finding is supported by substantial evidence, that finding is conclusive. RCr 9.78.

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

ALL CONCUR.

BRIEF FOR APPELLANT:
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BRIEF FOR APPELLEE:
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