

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000358-MR

DONALD G. BROWNING

APPELLANT

v. APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 01-CR-00040

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Donald G. Browning has appealed from a judgment and sentence of the McLean Circuit Court entered on January 9, 2002, which, pursuant to Donald's conditional plea of guilty, convicted him of three offenses and sentenced him to prison for one year. Having concluded that the trial court correctly denied Donald's motion to suppress evidence, we affirm.

On July 24, 2001, Donald Browning was indicted by a McLean County grand jury on one count of marijuana cultivation

over five plants,¹ one count of possession of drug paraphernalia,² and on one count of possession of marijuana under eight ounces,³ all while in the possession of a firearm.⁴ On March 4, 2002, a hearing was held on Donald's motion to suppress evidence obtained from a search of a residence. The evidence was that Donald and his brother Ronald Browning, who are twins, lived in a house owned by Ronald in Rumsey, Kentucky. While Donald lived at the house, he did not pay his brother rent.⁵ According to Donald, a man named Alton Rickard accused him of harassing Rickard's wife.⁶ Presumably in retaliation for this perceived harassment, Rickard began burglarizing the home where Donald and Ronald resided.⁷ On June 1, 2001, Rickard and an accomplice, Boyd Stewart, were in the process of burglarizing

¹ Kentucky Revised Statutes (KRS) 218A.1423. For a first offense, marijuana cultivation over five plants is a Class D felony.

² KRS 218A.500. For a first offense, possession of drug paraphernalia is a Class A misdemeanor.

³ KRS 218A.1422. Possession of marijuana under eight ounces is a Class A misdemeanor.

⁴ As part of Donald's plea agreement, the Commonwealth recommended that all three charges be amended to delete the "while in possession of a firearm" language. The trial court entered an order to that effect on December 18, 2001.

⁵ Donald did not graduate high school and only completed the ninth grade. Ronald described his brother as being "a little slow" and unable to read or write well.

⁶ Donald and Rickard's wife were at one time co-workers.

⁷ Rickard has admitted to committing at least three burglaries at the Browning home.

the Browning residence when they were startled by Donald,⁸ who had been hiding in a building on the property in an attempt to catch Rickard breaking into the house. Rickard and Stewart quickly fled the scene, but Donald pursued them in a pickup truck owned by his brother Ronald. During the chase, Donald called the Kentucky State Police on his cellular phone to report the burglary. Kentucky State Trooper Russell Nichols joined the pursuit, and he was eventually able to stop both Rickard and Donald.

A search of Rickard's vehicle at the scene of the stop revealed various items of drug paraphernalia and a nine millimeter handgun, all of which had apparently been stolen from the Browning home. Rickard subsequently informed Troopers Nichols and Payne that drugs could be found at the Browning residence. Trooper Payne testified that he then advised Donald of his Miranda⁹ rights and requested permission to search the

⁸ There is conflicting testimony from the suppression hearing regarding which one of the brothers startled the burglars and was eventually stopped along with the Rickard vehicle. Ronald testified that he was the one who chased Rickard and Stewart and that his brother Donald was at work at the time. Kentucky State Trooper Charles Payne, who assisted Trooper Russell Nichols with the stop in question, testified that Donald was the brother who had been stopped at the scene. The record of Donald's arrest corroborates Trooper Payne's testimony. Further, the trial court found that it was Donald who was stopped along with the Rickard vehicle. As no argument has been made that it was not Donald who was stopped, we presume that the trial court's finding was correct.

⁹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Curiously, Donald has repeatedly argued in his brief to this Court that he was never advised of his Miranda rights. He makes this claim despite the fact that (1) he has failed to point to any evidence whatsoever in the record supporting this allegation; (2) Trooper Payne testified that he advised

pickup truck.¹⁰ After no evidence was found in the truck, Trooper Payne and Donald proceeded to the Browning home.

Trooper Payne testified that upon arriving at the Browning home, he once again advised Donald of his Miranda rights, and the record shows Donald signed a written waiver of his rights at that time. Donald also signed a written consent form authorizing Trooper Payne to conduct a complete search of the premises where the Browning home was located. A search inside the home revealed numerous items of drug paraphernalia in Donald's room, including two bags of marijuana seeds. Trooper Payne also searched an area outside the home, where he found a five-gallon bucket with more than five marijuana plants growing inside. Donald admitted that all of the incriminating items, including those found in the possession of Rickard, were his. He was then indicted by a McLean County grand jury.

On December 14, 2001, Donald filed a motion to suppress the evidence seized at the Browning home. Following the suppression hearing, the trial court ruled that Donald's constitutional rights had not been violated after finding that Donald had given valid consent to search the Browning property. On January 9, 2002, pursuant to an agreement reached with the

Donald of his Miranda rights on two occasions; and (3) a signed, written waiver of his Miranda rights appears in the record.

¹⁰ The record shows that Donald signed a written consent form at the scene of the stop authorizing Trooper Payne to search the pickup truck.

Commonwealth, Donald entered a conditional plea of guilty, and reserved his right to appeal the denial of his motion to suppress. Following a pre-sentence investigation, the trial court ordered Donald to serve one year in prison on the marijuana cultivation conviction, and 12 months in the county jail for both the possession of drug paraphernalia conviction and the possession of marijuana conviction. All three sentences were ordered to run concurrently, resulting in a total sentence of one year in prison. This appeal followed.

Donald first argues that because he had no ownership interest in the Browning property, his consent to search the premises was invalid. Donald asserts that the evidence obtained from that search should have been suppressed. We disagree.

In United States v. Karo,¹¹ the Supreme Court of the United States stated:

Consent to search a container or a place is effective only when given by one with "common authority over or other sufficient relationship to the premises or effects sought to be inspected." "Common authority . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes. . . ." [citations omitted].

In the case at bar, it is not disputed that Donald had common authority over the entire Browning property along with his brother Ronald. At the suppression hearing, Ronald

¹¹ 468 U.S. 705, 725, 104 S.Ct. 3296, 3308, 82 L.Ed.2d 530 (1984).

testified that Donald had been living at the home for two years, that Donald had a key to the home, and that Donald had no restrictions with respect to his use of the property. Further, in his signed, written consent form authorizing the search of the Browning home and surrounding premises, Donald himself admits to having "full run of the house and property." Thus, Donald's claim that he could not give valid consent to search the premises because he had no ownership interest in the property is without merit.

Donald next argues that Trooper Payne exceeded the scope of any consent he may have given by not limiting the search of the Browning property to Donald's bedroom. Once again, we reject Donald's argument. The written consent form bearing Donald's signature clearly states that he gave Trooper Payne "authoriz[ation] . . . to conduct a complete search of [the] premises" where the Browning home is located. Simply put, there is no language in this consent form limiting the scope of the search to Donald's bedroom. As we discussed previously, since Donald had common authority over the "full run of the property," and since he gave consent to search the entire premises, Trooper Payne did not exceed the scope of consent by searching in areas outside of Donald's bedroom. Donald's argument to the contrary is wholly without merit.

Finally, Donald appears to argue that the search of the Browning property was improper because Trooper Payne did not first obtain a search warrant. This argument ignores the fact that Donald voluntarily consented to Trooper Payne's search of the Browning residence and the surrounding premises. A search warrant is not required where a valid consent has been obtained from an individual with the authority to do so.¹² Accordingly, this final argument is also unpersuasive.

Based on the foregoing reasons, the judgment of the McLean Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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¹² See Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S.Ct. 2793, 2797, 111 L.Ed.2d 148 (1990)(holding that "[t]he Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises" [citations omitted]).