

RENDERED: March 28, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001413-MR

ROBERT L. MITCHELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
ACTION NO. 02-CR-00348

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Robert Mitchell appeals from a judgment of the Fayette Circuit Court, entered June 10, 2002, convicting him of possession of a controlled substance in the first degree¹ and sentencing him as a first-degree persistent felony offender² to ten years in prison. Mitchell contends that the trial court erred when it denied his motion to suppress evidence. Finding no error, we affirm the judgment.

¹ KRS 218A.1415.

² KRS 532.080.

In late January 2001, a confidential informant reported to a narcotics detective of the Lexington Police Department that he had obtained the pager number of a person selling crack cocaine in Lexington. The detective had the informant use the number to arrange a buy. At the appointed time in the early evening of January 24, 2001, Robert Mitchell and a companion arrived at the appointed place in a gold-colored Cadillac that had already, a few days earlier, attracted the detective's attention. The informant made his purchase in the Cadillac with marked bills and pointed out the salesman, Mitchell, to the detective as Mitchell and his companion were driving away.

The detective dismissed the informant and followed the Cadillac for some time. However, he eventually lost it, and had the informant relocate Mitchell by phone and arrange a second buy. Once again the detective found the Cadillac at the appointed place, but rather than have the informant make a second purchase, this time the detective waited until Mitchell and the same companion were about to leave and had a uniformed police officer stop them. The detective then approached the Cadillac and asked Mitchell, the driver, for his license. When Mitchell stated that he did not have a license, the detective arrested him for that violation, had both occupants exit the vehicle, handcuffed Mitchell, advised him of his Miranda rights,

and searched the Cadillac for drugs. Beneath the ashtray in the dashboard he found \$170.00 in cash including the marked bills the informant had used. He did not, however, find any contraband.

The two men told the detective that they were sharing a motel room. The detective asked if he could search it. The men consented, so the scene shifted to the motel. There, the companion, in whose name the room was registered, took the room key from his shoe and admitted the police. When the search of the room produced no drugs, the detective asked the two men if they would consent to a strip search of their persons. According to the detective's testimony at the suppression hearing, the tone of the encounter from the beginning had been cordial and remained so even at this point. Again, both men consented to the search and voluntarily disrobed. In Mitchell's underwear the detective found two small packages of crack cocaine. Later, at the police station, Mitchell apparently made incriminating statements. He was charged with trafficking and with operating a vehicle without a license. When the court denied Mitchell's pre-trial motion to suppress the cocaine evidence and his statements, he pled guilty to the reduced charge of cocaine possession and reserved his right to appeal from the suppression ruling. He contends that his consent to

the strip search was involuntary and that the warrantless search was not otherwise justified.

Mitchell is correct, of course, that a person's consent to a search will relieve the state of the constitutional warrant requirement only if the consent is voluntary.³ Consent is not rendered involuntary, however, merely because the person giving it is under arrest or in police custody.⁴ Rather, voluntariness "is a question of fact to be determined by a preponderance of the evidence from the totality of all the circumstances."⁵

Mitchell contends that his companion's cooperation with the police virtually forced him to cooperate as well. That may be. The question, however, is not whether Mitchell believed his choices to be constrained, but whether his sense of constraint resulted from a show or threat of force by the police or from the police's wrongful assertion of authority.⁶

The detective testified, without contradiction from Mitchell (who did not testify at the suppression hearing), that

³ Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48, 36 L. Ed. 2d 854 (1973).

⁴ Talbott v. Commonwealth, Ky., 968 S.W.2d 76 (1998) (citing United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976)).

⁵ Id. at 82.

⁶ Cook v. Commonwealth, Ky., 826 S.W.2d 329 (1992); United States v. Mendenhall, 446 U.S. 544, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980); United States v. Boone, 245 F.3d 352 (4th Cir. 2001); United States v. Guimond, 116 F.3d 166 (6th Cir. 1997).

he had asked the two men to consent to the search, but had neither threatened them in any way nor suggested that they were obliged to consent. His rapport with the men, he testified, had been good. Mitchell, it should be recalled, had received his Miranda warnings. The detective's testimony is substantial evidence in support of the trial court's finding that Mitchell's consent to the strip search was voluntary. That finding, therefore, is conclusive.⁷ The consensual search did not violate Mitchell's constitutional rights, and thus the trial court did not error when it denied Mitchell's motion to suppress. Accordingly, we affirm the June 10, 2002, judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John Rampulla
Fayette County Legal Aid,
Inc.
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

William L. Daniel, II
Assistant Attorney General
Frankfort, Kentucky

⁷ RCr 9.78; Talbott v. Commonwealth, *supra*.