RENDERED: February 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002474-MR
AND
NO. 2003-CA-002478-MR

GABRIEL ROSAS-CALZADA — APPELLANT

v.

APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISSAC, JUDGE
ACTION NOS. 99-CR-00621-2 AND 99-CR-01192-2

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Gabriel Rosas-Calzada has appealed from two final judgments and sentences of imprisonment of the Fayette Circuit Court entered on October 28, 2003, following jury verdicts finding him guilty of trafficking in marijuana over five pounds,[1] possession of drug paraphernalia,[2] and bail jumping

[1] KRS 218A.1421(4) (stating that "[t]rafficking in five (5) or more pounds of marijuana is: (a) For a first offense a Class C felony. (b) For a second or subsequent offense a Class B felony."

[2] KRS 218A.500.

in the first degree.[3] Having concluded that the trial court did not err by denying Rosas-Calzada's motion to suppress evidence and his motion to sever the bail jumping charge for the purposes of trial, we affirm.

The record reveals that on April 30, 1999, Edward A. Hart, a narcotics detective for the Lexington Police Department (LPD), received a telephone call from the United States Drug Enforcement Agency (DEA) regarding a suspicious package being shipped by United Parcel Service (UPS). UPS had opened the package because it contained a fictitious address and thus was undeliverable. When UPS discovered what appeared to be 22 pounds of marijuana in the package, it turned the package over to the DEA. UPS also reported that an individual, identifying himself as Ramos, had contacted UPS and by using the package's tracking number had inquired about the package. Using the telephone number Ramos had given to UPS, Det. Hart contacted him about a date to deliver the package. LPD tracked the telephone number to apartment 303, at 2504 Larkin Road in Lexington. Due to the lack of officers on duty that day,[4] Det. Hart set the delivery time for the following Monday.

On Monday morning, May 3, 1999, Det. Hart telephoned the same number and a female answered. Det. Hart, under the

[3] KRS 520.070.

[4] It was the Friday of Kentucky Derby weekend.

assumed identity of a manager at UPS, stated that he needed to speak to Ramos. A male then answered the phone and Det. Hart told him that he was a manager at UPS and that he would personally deliver the package since their trucks were so busy that morning. The man told Det. Hart to deliver the package to apartment 303, 2504 Larkin Road, and Gabriel would sign for the package.

At approximately 11:00 a.m. on Monday May 3, Det. Hart drove to the 2504 Larkin Road address, posing as a UPS manager. As he parked his vehicle, he noticed an adult Hispanic male and a juvenile Hispanic male sitting in a vehicle parked nearby. The two Hispanic males watched Det. Hart as he got out of his vehicle and placed the package on the ground. The two Hispanic males then exited the vehicle and entered the apartment building.

Det. Hart went to apartment 303 and knocked on the door. A female answered the door, and Det. Hart told her he was there to deliver a package from UPS. Det. Hart then noticed that the two Hispanic males, who had been sitting inside the vehicle in the parking lot, were standing inside the apartment. Rosas-Calzada came to the door and gave Det. Hart his Kentucky driver’s license for identification. Det. Hart set the package on the floor outside of the apartment and handed Rosas-Calzada the clipboard to sign for the package. As Rosas-Calzada stepped

out of the apartment to pick up the package, two LPD officers seized him.

Det. Hart and the other officers then secured the apartment by keeping all the occupants in the front room. Det. Hart requested identification from Rosas-Calzada, the adult Hispanic male, and the juvenile Hispanic male. Before he made any other attempt to communicate with the suspects, Det. Hart radioed for a Spanish-speaking interpreter to come to the scene. The interpreter, Officer Jose Batista, arrived approximately 30 minutes later and explained to the suspects, in Spanish, why the officers were there. He explained to them their legal rights and then asked for their consent to search the apartment. Rosas-Calzada gave consent to search the apartment, and stated, "[n]othing else is here."

As a result of the search, the police seized an additional seven pounds of marijuana, scales, a spoon, and other items of drug paraphernalia from Rosas-Calzada's bedroom closet. Another box similar to the one Det. Hart had delivered that morning, bearing the same address in McAllen, Texas, was found in the bedroom closet. Subsequently, Rosas-Calzada and his roommate, Javier Rodriguez-Jimenez,[5] and the juvenile were taken into custody and charged with trafficking in marijuana and possession of drug paraphernalia.

[5] Rodriguez-Jimenez was the Hispanic adult sitting in the parked vehicle.

On June 7, 1999, a Fayette County grand jury indicted Rosas-Calzada for trafficking in marijuana over five pounds and possession of drug paraphernalia. On October 18, 1999, Rosas-Calzada filed a motion to suppress all the evidence seized from his apartment arguing that it was an unconstitutional warrantless search. After a suppression hearing was held on November 3, 1999, the trial court denied the motion.[6]

A jury trial was scheduled on March 14, 2000, but Rosas-Calzada, who was free on bond, failed to appear. On November 14, 2000, Rosas-Calzada was indicted for bail jumping in the first degree.[7] Rosas-Calzada was arrested on May 1, 2003, and his trial on the charges in both indictments was scheduled for September 23, 2003.

On September 15, 2003, Rosas-Calzada filed a motion to sever the indictments claiming that the bail jumping charge in the second indictment arose six months after the charges in the first indictment, and that the two sets of charges were "completely dissimilar in nature." On September 22, 2003, an order denying Rosas-Calzada's motion to sever was entered.[8]

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[6] Honorable Lewis G. Paisley presided.

[7] Co-defendant Rodriguez-Jimenez also failed to appear for his trial and was indicted for bail jumping in the first degree. From every indication in the record, he has not been apprehended.

[8] Honorable Sheila R. Isaac presided.

At the trial on September 23, 2003, Rosas-Calzada was found guilty of trafficking in marijuana over five pounds, possession of drug paraphernalia, and bail jumping in the first degree. The jury recommended that Rosas-Calzada be sentenced to six years in prison for trafficking in marijuana, five months in prison and a $500.00 dollar fine for possession of drug paraphernalia, and one year in prison for bail jumping. On October 28, 2003, the trial court entered two final judgments and sentences of imprisonment, accepting the recommendations of the jury. The trial court ordered Rosas-Calzada's two felony sentences to run consecutively for a total of seven years' imprisonment. These appeals followed.[9]

Rosas-Calzada's first argument is that the trial court erred by denying his motion to suppress the evidence seized in his apartment. Rosas-Calzada merely argues that since the police knew of the pending delivery of the marijuana three days in advance that "[i]t is clear that a warrant could have been obtained but the decision not to do so was based on it being Kentucky Derby weekend and the officers decided to make a controlled delivery of the package the following Monday morning, relying on the fact they would attempt to obtain consent to search when they delivered the package to any person in the apartment willing to sign the receipt for the package." The

[9] By order entered on January 15, 2004, these two appeals were consolidated.

flaw in this argument is that the Commonwealth relied upon the consent to search exception to the search warrant requirement and not the exigent circumstances exception. Rosas-Calzada does not even allege that the evidence at the suppression hearing did not support the trial court's finding of consent.

Both the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution protect citizens from unreasonable search and seizures conducted by the state.[10] Although a search is considered unreasonable if it is conducted without a warrant, a search may fall within one of the recognized exceptions allowing a warrantless search.[11] One of these exceptions occurs when the defendant gives his consent to search.[12] It is the Commonwealth's burden to show that the defendant voluntarily consented to the search through the specific circumstances involved in the case.[13] The Supreme Court of Kentucky in Cook v. Commonwealth,[14] stated that "[t]he question of voluntariness is to be determined by an objective

[10] Hazel v. Commonwealth, 833 S.W.2d 831, 833 (Ky. 1992).

[11] Farmer v. Commonwealth, 6 S.W.3d 144, 146 (Ky.App. 1999) (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)).

[12] Farmer, 6 S.W.3d at 146 (citing United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976)).

[13] Farmer, 6 S.W.3d at 146.

[14] 826 S.W.2d 329 (Ky. 1992).

evaluation of police conduct and not by the defendant's subjective perception of reality."[15]

The appellate court's standard of review when addressing a suppression motion is twofold.[16] "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 trial court's decision was correct as a matter of law" [citations omitted].[17] Substantial evidence is evidence of substance and relevant consequence to induce conviction in the minds of reasonable people.[18]

At the suppression hearing, both Det. Hart and Officer Batista testified that Rosas-Calzada was informed of his Miranda[19] rights, in Spanish, and he voluntarily consented to the search of his apartment. Rosas-Calzada told the officers that he was a resident of the apartment and even showed them which

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[15] Id. at 331 (citing Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)).

[16] Stewart v. Commonwealth, 44 S.W.3d 376 (Ky.App. 2000).

[17] Id. at 380. See also Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed. 911 (1996) (stating that the "determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal [but] . . . a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts. . .").

[18] Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998) (citing Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972)).

[19] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

bedroom belonged to him. Clearly, this evidence was sufficient to support the trial court's factual finding of consent and Rosas-Calzada has not argued otherwise.

Rosas-Calzada also claims the trial court erred when it denied his motion to sever the indictments for trial. Rosas-Calzada argues that the charge of bail jumping arose six months after the charges of trafficking and possession and that the charges are not otherwise sufficiently similar in nature to warrant joining them for the purpose of trial. We disagree.

RCr 9.12, consolidation of offenses for trial, states:

> The court may order two (2) or more indictments, informations, complaints or uniform citations to be tried together if the offenses, and the defendants . . . could have been joined in a single indictment, information, complaint or uniform citation. The procedure shall be the same as if the prosecution were under a single indictment, information, complaint or uniform citation.

RCr 6.18, joinder of offenses, states:

> Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

The trial court is afforded broad discretion in determining whether charges should be joined for a single trial. The decision to join separate offenses for a single trial shall not be overturned by the reviewing court without a showing of prejudice to the defendant and a clear abuse of discretion by the trial court.[20] In the context of a criminal proceeding, "'prejudice'" is a relative term meaning that which is "unnecessarily or unreasonably hurtful."[21]

Rosas-Calzada claims he was prejudiced in the eyes of the jury because the jury would draw the conclusion that since he jumped bail, he must be guilty of the drug charges. In determining whether a defendant will be prejudiced, it is important to look at the extent to which evidence of one offense would be admissible in a trial of the other offense.[22] Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence."[23] Our Supreme Court has held that evidence regarding flight is admissible in a trial because it is relevant

[20] Sherley v. Commonwealth, 889 S.W.2d 794, 800 (Ky. 1994) (citing Rearick v. Commonwealth, 858 S.W.2d 185, 187 (Ky. 1993)).

[21] Romans v. Commonwealth, 547 S.W.2d 128, 131 (Ky. 1977).

[22] Rearick, 858 S.W.2d at 187 (citing Spencer v. Commonwealth, 554 S.W.2d 355, 358 (Ky. 1977)); Marcum v. Commonwealth, 390 S.W.2d 884, 886 (Ky. 1965) (citing Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964)).

[23] Kentucky Rules of Evidence (KRE) 401.

to the defendant's guilt, i.e., a guilty person has the tendency to act like a guilty person.[24] Despite motive, evidence concerning flight is admissible to establish a presumption of guilt.[25] The trial court is not required to sever the offenses where, as here, the evidence of one offense would have been admissible in a trial of the other offense had there been separate trials.[26]

For the foregoing reasons, the final judgments and sentences of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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[24] Rodriguez v. Commonwealth, 107 S.W.3d 215, 219 (Ky. 2003).

[25] Damron v. Commonwealth, 313 S.W.2d 854, 856 (Ky. 1958) (citing Smith v. Commonwealth, 242 Ky. 399, 46 S.W.2d 513 (1932); and Allen v. Commonwealth, 302 Ky. 546, 195 S.W.2d 96 (1946)).

[26] Hayes v. Commonwealth, 698 S.W.2d 827, 829 (Ky. 1985) (citing Marcum, 390 S.W.2d at 884).