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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000320-MR

CARL BROWN — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 03-CR-00070

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Carl Brown appeals from a judgment of the Muhlenberg Circuit Court reflecting Brown's conditional plea of guilty to six counts of drug trafficking, possession of drug paraphernalia and firearms offenses. Under the terms of the guilty plea, Brown reserved the right to appeal the circuit court's denial of his motion to suppress evidence obtained during a search of his residence. Brown contends that though he

consented to the search, the consent was coerced and therefore involuntary. For the reasons stated below, we are not persuaded by Brown's argument and therefore affirm the order and judgment from which he appeals.

On March 20, 2003, law enforcement officers served an arrest warrant on Brown at his residence in Muhlenberg County, Kentucky. The warrant stemmed from charges that Brown illegally sold controlled substances. While arresting Brown, the officers sought and received Brown's permission to search the residence. Prior to conducting the search, Brown signed a form consenting to the search.

The search uncovered marijuana residue in plastic bags, a coffee can, and inside a vacuum cleaner. Officers also found scales with marijuana residue, a shotgun, two pistols, and a bank receipt for $3,500.

On June 17, 2003, Brown filed a motion to suppress the evidence obtained by the search. He argued that he was coerced into consenting to the search and signing the form, and that the consent was involuntary and without legal effect. After proof was heard, the circuit court rendered an order on November 13, 2003, denying the motion.

On January 8, 2004, Brown entered a conditional plea of guilty pursuant to RCr 8.09 to two counts of trafficking in marijuana between eight ounces and five pounds, one count of

possession of drug paraphernalia while in possession of a firearm, being a persistent felony offender in the second degree, and three counts of firearm possession by a convicted felon. He was sentenced to a term of between five and eight years on each count to be served concurrently for a total sentence of eight years in prison. This appeal followed.

Brown now argues that the trial court erred in denying his motion to suppress the evidence obtained during the search of his residence. He maintains that he did not give valid consent to search his residence because the consent was coerced and because the officers did not have a legitimate need to conduct a search. He seeks a reversal of the order denying the motion to suppress, a reversal of the judgment and conviction, and an order remanding the matter to the Muhlenberg Circuit Court for further proceedings.

Having closely examined the record and the law, we cannot conclude that the circuit court erred in denying Brown's motion to suppress. As the parties are well-aware, the constitutions of the United States and of the Commonwealth of Kentucky prohibit unreasonable search and seizure.[1] A search is reasonable, and therefore not unconstitutional on its face, if

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[1] Fourth Amendment to the United States Constitution; Section Ten of the Kentucky Constitution.

made voluntarily.[2] "Whether a consent to search was voluntarily given is a question of fact to be determined by a preponderance of the evidence from the totality of all the circumstances."[3] A trial judge's findings on this issue are conclusive if supported by substantial evidence.[4]

In the matter at bar, substantial evidence exists to support the trial judge's conclusion that Brown's consent to search was voluntarily made. It is uncontroverted both that Brown verbally consented to the search and subsequently consented in writing. These facts provide strong though not irrefutable evidence of Brown's intent. Brown maintains that he could not read the consent form without his glasses, and that this fact, taken alone, shows that he did not knowingly consent. Officers read the form to Brown before he signed it, however, and this argument does little to bolster his claim of error.

Brown also contends that he was coerced into signing the form because he was fearful that the officers would tear his house apart if they were forced to return with a search warrant. His counsel also suggests that the presence of six officers "with guns in their holsters" added to the level of coercion.

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[2] Kennedy v. Commonwealth, Ky., 544 S.W.2d 219 (1976).
[3] Talbott v. Commonwealth, Ky., 968 S.W.2d 76 (1998), citing Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854 (1973); Cook v. Commonwealth, Ky., 826 S.W.2d 329 (1992).
[4] Talbott, supra; see also RCr 9.78; Diehl v. Commonwealth, Ky., 673 S.W.2d 711 (1984).

We are not persuaded by this argument. It cannot reasonably be argued that anything the officers did while arresting Brown and seeking his consent to search can properly be characterized as coercion. There is no basis for reaching the conclusion that the officers would be destructive if they returned with a search warrant, and the argument that the officers' guns were holstered (where one might expect them) is hardly compelling. When all of the circumstances surrounding the consent are considered in their entirety, we cannot conclude that the trial court erred in determining that Brown consented to the search.

Lastly, Brown cites Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), for the proposition that the police must have a legitimate need for the search before requesting from a party his or her consent to do the search. Schneckloth does not establish this requirement. Rather than stating, as Brown contends, that the need for a particular search must be shown to be legitimate, Schneckloth merely noted that the police have a legitimate need to conduct searches, similar to the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. Brown's argument on this issue is not compelling and does not form a basis for tampering with the order on appeal.

For the foregoing reasons, we affirm the order and judgment of the Muhlenberg Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
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