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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000686-MR
and
NO. 2004-CA-000694-MR

GREGORY D. HELTSLEY — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
INDICTMENT NOS. 01-CR-00055 & 03-CR-00022

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.[1]

PAISLEY, SENIOR JUDGE: This is an appeal from an order of the Caldwell Circuit Court which denied the appellant's motion to suppress certain evidence discovered during a search of his home. Gregory D. Heltsley entered a conditional guilty plea to possession of a controlled substance in the first degree (methamphetamine), possession of marijuana and being a

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

persistent felony offender in the second degree (PFO II). He challenges the circuit court's denial of his motion to suppress evidence on the basis that his wife's consent to search their home was involuntary. In addition, he argues that even if her consent was voluntary, the evidence seized from his home should be suppressed under the fruit of the poisonous tree doctrine. We conclude the trial court properly denied the motion. Thus, we affirm.

On May 8, 2001, Mr. Heltsley bought two boxes of Sudafed and dog food at Wal-Mart. After he made his purchase, Wal-Mart personnel called the Princeton Police Department to report the fact that he had purchased Sudafed. Apparently, they also followed Mr. Heltsley out of the store into the parking lot as they called the police again to report his whereabouts as he left the premises.

After leaving Wal-Mart, Mr. Heltsley got in line at the drive-thru at McDonald's. The police pulled into the McDonald's parking lot and observed Mr. Heltsley's vehicle. When he pulled out of McDonald's, he did not stop or use a turn signal. The police pulled him over.

After obtaining Mr. Heltsley's consent, the police searched his clothing and his vehicle. In his clothing, the police found a pocketknife and four loose lithium batteries. In his vehicle, the police found marijuana, rolling papers, two

boxes of Sudafed, dog food, and a set of digital scales, on which there was methamphetamine residue.

A couple of weeks before the traffic stop, the Caldwell County Sheriff's Department had received complaints of trash being discarded on a road close to the Heltsley home. The trash bags contained equipment used to manufacture methamphetamine. Deputies with the sheriff's department suspected that Mr. Heltsley had been depositing the trash. When the call came over dispatch that Mr. Heltsley had been taken into custody on suspected methamphetamine charges, two officers went to his residence.

Mr. Heltsley's wife, Lesa Heltsley, was home when the police arrived. According to her testimony at the suppression hearing, they informed her that Mr. Heltsley had been arrested for shoplifting, and they told her that they wanted to search the house. She testified that she initially refused their request. The deputies then informed her that one of them would stay with her at the house while the other went to get a search warrant, and she would be charged with whatever they found in the house. If she would consent to the search, however, they indicated they would not charge her. Mrs. Heltsley testified that she knew there was marijuana in the house, and did not want to be charged with any offenses related to its possession, so she gave her written consent to the search. During the search,

officers seized marijuana, Liquid Fire, tubing that had a bottle cap attached to it, aluminum foil with residue, and a black trash bag in an outside garbage can containing several bottles with a strong odor. At the conclusion of the search, one of the officers issued Mrs. Heltsley a citation for possession of marijuana.

About five months after these events, the Caldwell County Grand Jury indicted Mr. Heltsley for two counts of manufacturing methamphetamine in the first degree, possession of a controlled substance in the first degree, possession of drug paraphernalia, driving under the influence, failure to/or improper signal, failure to wear a seat belt, possession of marijuana, and reckless driving. Later, Mr. Heltsley was also charged with PFO II.

Mr. Heltsley moved to suppress the items seized from his home, his clothing and his vehicle. Regarding the search of his home, he alleged that his wife's consent was not voluntary because the officers threatened to charge her if she did not let them search their home in violation of Mr. Heltsley's constitutional rights.

The trial court conducted a hearing on the motion. In addition to Mrs. Heltsley's testimony regarding the search of her home, which is summarized above, one of the officers who

conducted the search, Billy Woosley, gave his version of the events. He testified as follows:

> But when I heard that Mr. Heltsley had been pulled over, and I talked to Officer McDowell – I think on the phone I asked Officer McDowell who he had pulled over and for what. When he advised me who he had pulled over myself and Sheriff Hudson went to Mr. Heltsley's residence where we met his wife, Lisa [sic] Heltsley. At that point, we talked to Ms. Heltsley, advised her about what was going on, our suspicions, asked consent to search her house, which she gave us, and we also went ahead and got a written consent form. At that point we – Ms. Heltsley also advised us that there was some marijuana in the house, told us exactly where is was and took us in and showed us where it was at.

Officer Woosley brought the written consent form to court, but, for whatever reason, it does not appear to be part of the record on appeal. Officer Woosley denied that Mrs. Heltsley initially refused to let the officer search the house and further denied that the officers threatened to charge her with the same charges as Mr. Heltsley if she did not let them search.

At the conclusion of the suppression hearing, the trial court found as follows:

> Coincidental with [the] search [of Mr. Heltsley's car], two officers proceeded to the home of the Defendant and there met his wife. The Court finds that the Defendant's wife was advised that she would not have to consent to the search and the officers would have to get a search warrant. However,

> believing that she would not [sic] charged if they found the marijuana which was in the house, the Defendant's wife voluntarily consented to the search of the home. Various evidence was found; and although a citation was issued for the Defendant's wife, she was not indicted for any crimes involving this prosecution.
>
> The Court finds that the search of the home was pursuant to a valid, written consent given to the officers by Mrs. Heltsley.
>
> ...
>
> The Court further finds that since the search of the home was with the consent of Mrs. Heltsley, the consent was not tainted, even if the Court finds that the stop of Mr. Heltsley was unlawful. In essence the consent sanitizes any taint from the poison tree.

After allowing the Commonwealth additional time to respond to Mr. Heltsley's arguments, the trial court granted the motion to suppress the evidence seized during the search of his person and vehicle.

Once the trial court ruled on his motions to suppress, Mr. Heltsley entered a conditional guilty plea subject to his right to appeal the trial court's ruling on the search of his residence.

The trial court impaneled a jury to impose punishment on the PFO II charge. The jury recommended seven years, and the trial court later sentenced Mr. Heltsley in accordance with the jury's recommendation. This appeal followed.

Mr. Heltsley argues that the trial court erred in failing to suppress the evidence seized in the search of his home because Mrs. Heltsley's consent was not voluntarily given. In the alternative, he contends that her consent could not sufficiently attenuate the taint of his illegal arrest, and therefore the evidence seized from his home should have been suppressed as the fruit of the poisonous tree.

Under the Fourth Amendment, a search without a warrant is unreasonable. See Cook v. Commonwealth, 826 S.W.2d 329, 331 (Ky. 1992) citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). One exception to this rule is voluntary consent given by either the individual who is the target of the search or a third party who possesses common authority over the premises. See Colbert v. Commonwealth, 43 S.W.3d 777, 779-780 (Ky. 2001).

In this case, Mr. Heltsley does not dispute that his wife possessed common authority over their home, but he does challenge the trial court's finding that she voluntarily consented to the search. Mr. Heltsley argues that the officers threatened Mrs. Heltsley with the acquisition of a search warrant that they could not have obtained because they did not have probable cause. Moreover, Mr. Heltsley contends that the officers misrepresented the circumstances of his arrest and the purpose of their search. Finally, Mr. Heltsley asserts that the

officers induced Mrs. Heltsley's consent with a false promise that she would not be charged with anything in the house, yet they issued her a citation for possession of marijuana at the conclusion of the search.

Whether consent to search was voluntarily given is a question of fact to be determined by a preponderance of the evidence from the totality of the circumstances. Talbott v. Commonwealth, 968 S.W.2d 76, 82 (Ky. 1998), citing Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The Commonwealth carries the burden of proving that consent was voluntarily given and was not the result of duress or coercion, express or implied. See Cook, 826 S.W.2d at 331-332. However, when reviewing the denial of a motion to suppress evidence, we must consider the evidence in the light most favorable to the Commonwealth. See United States v. Erwin, 155 F.3d. 818, 822 (6th Cir. 1998).

If the factual findings of the trial court are supported by substantial evidence, then they are deemed conclusive. See RCr 9.78. They are not to be disturbed unless they are clearly erroneous. See Ornelas v. United States, 517 U.S. 690, 691, 116 S.Ct. 1657, 1659, 134 L.Ed.2d 911 (1996) and Commonwealth v. Banks, 68 S.W.3d 347, 349 (Ky. 2001). Conclusions of law, however, are reviewed *de novo*. See Id.

In United States v. Watson, 423 U.S. 411, 424-425, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), a case decided after Schneckloth, the United States Supreme Court applied the Schneckloth holding. In so doing, the Court identified several factors that should be considered in deciding under the totality of the circumstances whether consent was freely and voluntarily given. As applied to this case, those factors are: (1) did the officers make promises to Mrs. Heltsley; (2) was there any indication of more subtle forms of coercion that might flaw her judgment; (3) was she in custody; (4) did the officers advise her that she could withhold her consent; and (5) was there any indication that Mrs. Heltsley was a newcomer to the law, mentally deficient, or unable to exercise a free choice. See Id. at 424-425.

We acknowledge that Mrs. Heltsley's testimony paints a picture in which the police were not completely forthcoming with her, and attempted to persuade her with false promises and threats. However, the factual findings of the trial court do not support Mrs. Heltsley's version of events. The trial court found that the officers told Mrs. Heltsley that she did not have to consent and that they would have to obtain a search warrant. Believing that she would not be charged with the marijuana found in the house, she voluntarily consented to the search. Those factual findings are not to be disturbed unless they are clearly

erroneous. See Ornelas, 517 U.S. at 691. We find no reason to believe that they are.

In any event, it is clear that some level of pressure and deceit by law enforcement officers will be tolerated without vitiating consent. See Hadley v. Williams, 368 F.3d 747, 749 (7th Cir. 2004). In this case, the officers did not mislead Mrs. Heltsley about their suspicions of illegal drug activity in the house. Although she was cited for possession of marijuana, she was not arrested and the Commonwealth did not pursue the charge against her. Again, we accept the trial court's analysis and findings of fact.

Mr. Heltsley further contends that Mrs. Heltsley's consent was involuntarily given because the police threatened to obtain a search warrant knowing that there was not probable cause to search. It is true that a baseless threat to obtain a search warrant as a pretext to induce consent may render that consent involuntary. See United States v. Salvo, 133 F.3d 943, 954-955 (6th Cir. 1998). When the expressed intention to obtain a warrant is genuine, however, and not merely a pretext to induce submission, it does not vitiate consent. United States v. White, 979 F.2d 539, 542 (7th Cir. 1992).

In this case, the police discovered evidence of methamphetamine manufacturing near the Heltsley home a few weeks prior to Mr. Heltsley's arrest. In addition, Mr. Heltsley was

arrested shortly before the encounter with Mrs. Heltsley with methamphetamine precursors and methamphetamine residue in his possession. Thus, the evidence collected in the investigation up to the point they asked for consent to search the home provided a basis to attempt to obtain a search warrant. Whether or not the police would have ultimately obtained a warrant is immaterial. Our review of the record suggests that even though a magistrate may have not issued a warrant based on the evidence, the threat to obtain a search warrant was genuine and had a basis in fact. Therefore, having viewed the facts in the light most favorable to the Commonwealth, having committed credibility determinations to the discretion of the trial court, and having considered the totality of the circumstances, we find no basis to disturb the ruling of the trial court that Mrs. Heltsley consented voluntarily to the search of her residence.

We now turn to Mr. Heltsley's fruit of the poisonous tree argument. The trial court found that Mrs. Heltsley's consent sanitized the taint from Mr. Heltsley's illegal detention. We review the trial court's conclusions of law *de novo*. See Ornelas, 517 U.S. at 691.

Mr. Heltsley contends that Mrs. Heltsley's consent could not sufficiently attenuate the taint of his illegal arrest, and therefore the evidence seized from his home should

have been suppressed as the fruit of the poisonous tree. We disagree.

The issue is, "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

In determining whether the discovery of evidence is sufficiently attenuated, the United States Supreme Court in Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), suggested the consideration of three factors: (1) temporal proximity; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. Id. at 603-604. Voluntariness is a threshold requirement. Id. at 604.

Having already concluded that Mrs. Heltsley's consent was voluntary, we now turn to the factors listed in Brown. We acknowledge that a relatively short period of time passed between Mr. Heltsley's illegal detention and Mrs. Heltsley's consent. That short period of time undoubtedly weighs in favor of the conclusion that the consent was tainted by the illegal detention.

On the other hand, the second factor, the presence of intervening circumstances, weighs heavily in favor of the opposite conclusion. Mrs. Heltsley voluntarily signed a consent form and allowed the officers into her home to search for evidence of illegal drug activity. The officers did not arrive at the Heltsley home to request consent based solely on the information gleaned from the illegal stop. Rather, the information from the stop corroborated their prior suspicion that the trash bags, which contained evidence of methamphetamine manufacturing, came from the Heltsley home. As at least one federal appellate circuit has explained, "even if the police were motivated to request permission to search by information gleaned through an illegal search, such conduct does not fall afoul of the Fourth Amendment." United States v. Williams, 356 F.3d 1268, 1273 (10th Cir. 2004).

With respect to the third factor, there is no evidence suggesting that the purpose of either Mr. Heltsley's detention or the questioning of Mrs. Heltsley was abusive or flagrantly inappropriate. The police made a traffic stop based on information that was ultimately found to not rise to the level of reasonable suspicion. That was an error, not a deliberate circumvention of the law. They then used the information from the stop to approach Mrs. Heltsley in an attempt to obtain consent to search the Heltsley home, where they expected to find

evidence of methamphetamine manufacturing. They told Mrs. Heltsley that if she did not consent, then they would return with a search warrant and she would be charged with any illegal evidence discovered in the house. We do not consider those circumstances to be evidence of an unlawful purpose or a flagrant abuse of police power, and we agree with the trial court that Mrs. Heltsley's consent in this case was a sufficient intervening circumstance to purge the illegality of Mr. Heltsley's illegal arrest.

BUCKINGHAM, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS BY SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING BY SEPARATE OPINION: Respectfully, I dissent. Consent that is coerced is not freely and voluntarily given. Under all the circumstances, it is apparent that law enforcement officers obtained the wife's consent to search the home only after they (1) illegally detained her husband; (2) showed up at the house and informed her of his arrest; (3) told her they could get a search warrant when they did not have probable cause to do so; and then (4) promised her that she would not be charged with any offenses related to what they found in the house. I would hold that consent obtained under these circumstances is coerced and should not be sanctioned.

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