

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001823-MR

STEVEN ROY WIDENER

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CR-00352

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

VANMETER, JUDGE: A search incident to arrest must take place contemporaneously with the apprehension of the person arrested.

In this case, we must decide whether the search of Steven Widener's motel room, following his arrest pursuant to an arrest warrant, exceeded the scope permitted by the Fourth Amendment. We hold that it did not and therefore affirm the judgment of the Boone Circuit Court.

On March 23, 2002, Boone County Deputy Sheriffs Brad Ezell and Jeff Ruber were attempting to execute a valid

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

misdemeanor arrest warrant on Steven Roy Widener at a Days Inn in Richwood, Kentucky. Initially, the deputies were unable to gain access to Widener's room because Widener had latched the door's safety chain. During a brief stand-off, the deputies observed Widener moving about the room, both in and out of their view. Finally, Widener unlocked and opened the door. Ezell handcuffed Widener at the door, and Ruber and Deputy Sergeant Jim Wermeling entered the room to make certain that no other persons were present. While either entering or exiting the room, Wermeling noticed two items on the dresser beside the television which he believed were crack pipes. Wermeling and Ruber then undertook a more detailed search of the motel room, and they found a single rock of crack cocaine hidden under a pillow on one of the room's beds. After being Mirandized² by Deputy Ezell, Widener admitted that he had smoked crack earlier that day.

Widener was charged with second-offense possession of drug paraphernalia,³ first-degree possession of a controlled substance,⁴ and first-degree persistent felony offender.⁵ Following a hearing at which all three officers testified, the

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

³ KRS 218A.500.

⁴ KRS 218A.1415.

⁵ KRS 532.080.

Boone Circuit Court denied Widener's motion to suppress, finding "that the search of the room was a plain view search and the items were in plain view and there were items seized by the police in an area which was in the immediate reach and control of the Defendant." After a jury found Widener guilty of all counts, he was sentenced to a total of ten years. This appeal follows.

Widener raises two issues for our review. He claims the trial court erred both in failing to suppress the fruits of the warrantless search of the motel room, and in failing to declare a mistrial when the trial court read from the indictment that the drug paraphernalia charge was a "subsequent offense."

Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold: first, the court's factual findings are conclusive if they are supported by substantial evidence; and second, this court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law.⁶

Widener's primary argument regarding his suppression motion is that the deputy sheriffs' entry into his motel room, following his arrest at the door, was an unlawful search. We disagree. As held in *Shipley v. California*,⁷ the "search

⁶ *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). See RCr 9.78.

⁷ 395 U.S. 818, 819, 89 S.Ct. 2053, 23 L.Ed.2d 732 (1969).

incident to arrest" exception to the warrant requirement permits law enforcement officers to search an arrestee's person, and the area within his immediate control, so long as the search is "substantially contemporaneous with the arrest."⁸ If an area is within the immediate control of the arrestee at the beginning of the encounter with law enforcement officers, the officers may search the area at the scene of the arrest within a reasonable time of the arrest.⁹ To hold otherwise would encourage officers to proceed more hastily than necessary and would expose them to danger during their investigation.¹⁰ This principle has been held to permit searches of motel rooms where the arrest occurs at the doorway.¹¹

In the present case, Widener was arrested at the door to the motel room upon opening the door. At the initiation of the contact, he had access to the entire room, and the search was reasonably contemporaneous with the arrest. The trial court did not err in denying Widener's suppression motion.

⁸ 395 U.S. at 819-20, 89 S.Ct. at 2054, holding that "a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." (Internal quotation and citations omitted.)

⁹ *In re Sealed Case 96-3167*, 153 F.3d 759, 767-68 (D.C. Cir. 1998). See *Collins v. Commonwealth*, 574 S.W.2d 296, 298 (Ky. 1978). In *New York v. Belton*, 453 U.S. 459, 101 S.Ct. 2860 (1981), the Court upheld a search of an automobile incident to arrest, notwithstanding that all the occupants of the vehicle had been removed and no longer had access to its contents.

¹⁰ *United States v. Han*, 74 F.3d 537, 543 (4th Cir. 1996).

¹¹ *United States v. Burns*, 624 F.2d 95, 101 (10th Cir. 1980).

Widener's second argument is that the trial court erred in failing to declare a mistrial following the trial court's reading from the indictment to the venire panel that one of the charges was the "use or possession of drug paraphernalia, second or greater offense." While "[e]vidence of a prior conviction introduced only for enhancement purposes should always be reserved to the penalty phase of a trial"¹² this court should disregard any error "that does not affect the substantial rights of the parties."¹³

Aside from the preservation issue relating to Widener's failure to ask specifically for a mistrial,¹⁴ we note that in this case, Widener was arrested in a motel room in which he alone was staying. Law enforcement officers found two crack pipes and a rock of crack cocaine, and Widener admitted to the deputies that he had smoked crack earlier that morning. In view of the overwhelming evidence against Widener, as well as the fact that Widener received the minimum possible sentence of 10

¹² *Hayes v. Commonwealth*, 175 S.W.3d 574, 594 (Ky. 2005).

¹³ RCr 9.24.

¹⁴ *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989) (holding that "a party must timely inform the court of the error and request the relief to which he considers himself entitled. Otherwise the issue may not be raised on appeal.")

years, we are of the opinion that the trial court's remark amounted to harmless error.¹⁵

The judgment of the Boone Circuit Court is affirmed.

HENRY, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS BY SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, DISSENTING BY SEPARATE OPINION. I respectfully dissent from the portion of the majority opinion that holds the search and seizure of the single rock of crack cocaine hidden under a pillow was a valid search incident to arrest. Therefore, I would reverse and remand for a new trial.

The trial court denied Widener's suppression motion on the grounds that the items seized, including crack pipes and a rock of crack cocaine, were in plain view and were within Widener's immediate reach and control. Because the crack cocaine rock was hidden under a pillow, it was obviously not within plain view of the officers. Furthermore, because Widener had been handcuffed and removed from the room, the crack cocaine rock was not within his immediate reach and control. I agree with Professor Abramson's statement in Kentucky Practice,

¹⁵ See *Renfro v. Commonwealth*, 893 S.W.2d 795, 797 (Ky. 1995) (court stating that "[t]he test for harmless error is whether there is any reasonable possibility that absent the error the verdict would have been different"); *Scott v. Commonwealth*, 495 S.W.2d 800, 801-02 (Ky. 1972) (an error is harmless if, considering the whole case, no substantial possibility exists that the result would have been any different had the error not occurred).

Criminal Practice and Procedure, Vol. 8, § 18:146, that "[g]iven the rationale for the search incident to arrest, this theory cannot support a search occurring after the arrestee has been removed from the premises."

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