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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000178-MR

DONALD J. ASHER — APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT McGINNIS, JUDGE
INDICTMENT NO. 04-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

PAISLEY, SENIOR JUDGE: Donald J. Asher appeals from a final judgment of the Pendleton Circuit Court, sentencing him to serve eight years for one count of first degree trafficking in a controlled substance (methamphetamine). Asher was arrested after police obtained a warrant to search his house and discovered various drugs and drug paraphernalia. Asher moved to

[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.

suppress the evidence, arguing that the police officers had been operating under an invalid search warrant and had failed to allow sufficient time between knocking and announcing their presence and entering his home. After hearing testimony and oral arguments, the trial court denied the motion to suppress. Asher entered a conditional plea of guilty, thereby reserving the right to appeal the denial of his motion. We affirm.

Kentucky Rule of Criminal Procedure 9.78 governs our review of the circuit court's decision on the motion to suppress. It states that "[i]f supported by substantial evidence the factual findings of the trial court shall be conclusive." RCr 9.78. "[W]hen the findings of fact are supported by substantial evidence, the question then becomes whether the rule of law as applied to the established facts is violated. Commonwealth v. Whitmore, 92 S.W.3d 76, 79 (Ky. 2002). In performing this part of the review, Kentucky has adopted the approach established by the United States Supreme Court in Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Id. Ornelas states in pertinent part as follows:

> [A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that 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 by resident judges and local law enforcement officers.

Id., quoting Ornelas, 517 U.S. at 699, 116 S.Ct at 1663, 134 L.Ed.2d at 920.

The Kentucky Supreme Court has noted that "[t]he Ornelas court recognized that police may draw inferences of illegal activity from facts that may appear innocent to a lay person and that a reviewing court should give due weight to the assessment by the trial court of the credibility of the officer and the reasonableness of the inferences." Id.

The first issue on appeal concerns the affidavit used by Kentucky State Trooper Scott Davenport to obtain the warrant to search Asher's residence. Asher contends that the affidavit contained false and misleading information, and that therefore exclusion of the evidence was the appropriate remedy. See Commonwealth v. Opell, 3 S.W.3d 747, 752 (Ky.App. 1999).

The affidavit was based on information provided to Davenport by Christopher Cummings, who was arrested for possession of marijuana. He told Davenport that he had bought the marijuana at Asher's residence the previous evening, that he had bought marijuana at Asher's residence twice a week for the past year, and that he could buy marijuana and drugs from Asher and his family any day of the week. He also told Davenport that

the drugs were sold on the ground floor of the house, and that many people congregated there.

On the basis of this information, Davenport went to Asher's house. He observed various people around the house, on the porch and in the doorway. Davenport had previously been involved in arresting several people on the same property.

Davenport then prepared an affidavit for a warrant to search Asher's house. He did not disclose Cumming's name in the affidavit in order to protect him. On the basis of the affidavit, the trial commissioner signed a search warranting authorizing a search of Asher's home.

The affidavit stated in relevant part as follows:

> [A]ffiant [Davenport] received information from:
>
> > subject who has established themselves as a confidential informant by providing information in the past that has produced reliable information. The informant stated that on the evening of 17 November 2003 they bought a half quarter bag of Marijuana for $30.00 from Robert "Possom" Asher at the Asher residence located at 406 Park Street, Falmouth, KY 41040 in Pendleton County. The informant stated that he has bought Marijuana and . . . prescribed medication from Donald Asher, J. B. Asher and other Asher family members at the previous . . . address. The informant further stated that he has bought Marijuana from the Ashers at this location on a regular basis of 2 times a week for the past year. The subject also added that he could buy Marijuana and prescription drugs from the Asher's [sic] any day of the week and he could not remember the last time he was unable to

> purchase drugs when he attempted to do so. Informant advised that at various times many people . . . regular household members and other what might be called recurrent occupants or guests, all found on . . . within the premises; that the ground floor consists of a few small rooms, with most people congregating in . . . kitchen and living room on the ground floor; that the transactions occurred with several other present besides the principals, and that they always occur on the ground floor after the actual seller took no more than . . . minute to retrieve the drugs from locations on the ground floor of the house.

Asher takes specific exception to the description of Cummings in the affidavit as a "subject who has established themselves [sic] as a confidential informant by providing information in the past that has produced reliable information." He maintains that this phrase was used by Davenport to bolster the informant's credibility, and to mislead the trial commissioner who issued the warrant into believing that the confidential informant had provided information that had led to the issuance of search warrants in the past. We disagree. The statement in the affidavit does not necessarily imply that the informant had previously supplied Davenport with information to support a warrant.

Asher further contends that the statement is misleading because the only type of information Cummings had ever given Davenport consisted of confessions of his own guilt, and that standing alone, a confession does not produce reliable

information that officers may act on in the future. At the suppression hearing, Davenport testified that he had been personally acquainted with Cummings and his family for a long time, that he had received reliable information from Cummings when he had been in trouble with the police before, and that Cummings had always been honest even when his statements were self-incriminating confessions of his own crimes that involved other people. The language in the affidavit simply does not contradict any of these statements, nor do we agree with Asher's contention that Cummings' confessions could never have produced to reliable information. There is simply no evidence to support the view that the statement in the affidavit was false or misleading, or that Davenport intended it to be so.

The trial court determined that

> [t]he affidavit for search warrant did not contain incorrect or false information as alleged in defendant's motion. The officer had personally known the confidential informant for many years and as stated in the affidavit, the informant had provided " . . . information in the past that has produced reliable information." The search warrant was therefore valid.

The trial court's finding of fact in this regard is supported by substantial evidence, and we find no error in its conclusion.

Asher's next argument is that the police officers failed to wait a "reasonable" period after knocking and announcing their presence before entering the Asher residence.

Davenport and several other officers including Kentucky State Trooper Gerald Feiger went to Asher's house to execute the warrant. While the other officers secured the perimeter of the house, Davenport and Feiger went to the main entrance. The door had a large glass pane and Davenport and Feiger spent one or two minutes observing the people inside the house, who were sitting around a table. Davenport testified that the Ashers' daughter was rolling what looked like marijuana cigarettes on a plate. Feiger then knocked and announced "Kentucky State Police, we have a search warrant." He grabbed the doorknob and noted that the door was unlocked. They continued to observe the individuals inside the house. Asher's wife moved towards the door or sink area. Both officers testified that they witnessed some movement and fumbling at the table. Then, while simultaneously announcing their presence again, both Davenport and Feiger entered the house. Asher's daughter jumped up and threw the plate behind her. The contents scattered over the floor. Feiger testified that the time that elapsed from his initial knock to their entrance was "maybe ten seconds." Davenport described it as "just a few seconds."

"[T]he common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry." Wilson v. Arkansas, 514 U.S. 927, 930 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995). "The knock and announce rule has three purposes: (1) to protect law enforcement officers and household occupants from potential violence; (2) to prevent the unnecessary destruction of private property; and (3) to protect people from unnecessary intrusion into their private activities." Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998) citing Wilson, 514 U.S. 927.

In order to justify a no-knock entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. Adcock, 967 S.W.2d at 9, citing Richards v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416, 1421-22, 137 L.Ed.2d 615 (1997).

Asher has relied on two opinions of the federal Court of Appeals for the Sixth Circuit. In United States v. Dice, 200 F.3d 978 (6th Cir. 2000), that Court explained that "[a]n integral part of the knock-and-announce rule is the requirement that officers wait a "reasonable" period of time after a knock before physically forcing their way into a residence. This

gives the private resident the opportunity to allow them into the residence. Id. at 983 (citation omitted). Yet the Dice court also noted that officers may dispense with the knock and announce requirement when "the officers have a justified belief that those within are aware of their presence and are engaged in escape or the destruction of evidence." Id. at 983. Similarly, in United States v. Finch, 998 F.2d 349 (6th Cir. 1993), the same court acknowledged that the policy may claim an exception to the rule based upon an exigency, noting that "[j]ustification for forced entry into a residence is ordinarily a fact-oriented issue. The outcome may be determined not only by evidence of events at the scene, but also by evidence concerning police knowledge of the propensities of persons who may occupy the premises. Id. at 354-55.

Asher has conceded that under certain circumstances, officers with a warrant may enter immediately after knocking or dispense with knocking altogether. He insists, however, that exigent circumstances regarding the destruction of evidence did not exist in this case. He notes that neither of the officers testified that any of the occupants made sudden movements in response to their "knock and announce." He also points to Feiger's testimony that people at the table had a "deer in the headlights" look, and that the only relevant testimony Feiger offered regarding destruction of evidence was that he saw

somebody fumbling around the table. As to Asher's daughter throwing the plate with alleged marijuana cigarettes on it, Asher notes that this occurred only after the second "knock and announce." Asher also notes that Mrs. Asher appeared to be coming to the door after the first knock.

The trial court made the following findings of fact:

> 1. In approaching the door of the home to execute the search warrant, the officers could see the occupants in the kitchen through the window.
>
> 2. Upon knocking and announcing their identity, they could see the occupants shuffling around in the kitchen although no one approached the door to answer the knock.
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> 3. After approximately 10 seconds elapsed and reasonably suspecting that the occupants were attempting to destroy the evidence, one of the officers turned the doorknob, opened the door (which was unlocked), announced his identity and entered the home.

The trial court concluded that the "officers' actions were reasonable under the circumstances and the ensuing search was therefore lawful."

We agree. Although the Supreme Court has clearly stated that there is no blanket exception to the knock-and announce exception for drug cases, see Richards v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997), in this case the officers' belief that evidence might be destroyed if they waited too long after the first knock and announce was

reasonable based on what they observed. The officers were clearly visible to those inside the house through the glass door. Both officers observed fumbling or scrambling among the people at the table, and the fact that the officers saw the Ashers' daughter rolling what appeared to be marijuana cigarettes suggests that if they had waited any longer, some of the drug evidence might have been destroyed. Furthermore, although Mrs. Asher appeared to be coming to the door, Davenport also testified that she might have been approaching the sink which was located directly beside the door.

As to the three interests advanced by the knock and announce requirement, see Adcock, 967 S.W.2d at 8, the only one that appears relevant in this case is the protection of individuals from unnecessary intrusion into their private activities. Because the door was unlocked, unnecessary destruction of private property was not a concern, nor was potential violence rooted in surprise. Under the circumstances, where the destruction of evidence was a clear possibility, the officers' conduct did not constitute an unnecessary intrusion into the private activities of the inhabitants of the house.

For the foregoing reasons, the judgment of the Pendleton Circuit Court is affirmed.

ALL CONCUR.

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