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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000945-MR

CHARLES WALLING, JR. APPELLANT

v.

APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
INDICTMENT NO. 01-CR-00041

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF AND TACKETT, JUDGES; AND HUDDLESTON, SENIOR JUDGE[1].

KNOPF, JUDGE: Charles Walling, Jr. appeals from a judgment of conviction by the Hancock Circuit Court following a conditional guilty plea. He argues that the police coerced him to give written and oral consent to search his property, and therefore all evidence seized as a result of those searches should have been suppressed. Because the trial court's finding that the

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

consent was voluntary was supported by substantial evidence, we affirm.

On December 11, 2001, a Hancock County grand jury indicted Walling on one count each of first-offense cultivating marijuana, more than five plants,[2] and first-offense manufacturing methamphetamine.[3] The charges arose from a search of Walling's property that occurred on September 12, 2001. On that date, the Hancock County Sheriff's Department received a call regarding a possible drug overdose at Walling's residence. Deputy Charles Jones went to the scene and learned that Walling's wife, Belinda Walling, had taken an overdose of prescription medication. An ambulance and emergency medical personnel arrived on the scene shortly after Deputy Jones. Thereafter, Belinda Walling was taken to the hospital.

Deputy Jones testified that he had received information from his dispatcher that there might be marijuana on the premises or in Walling's car. However, the original source of this information was never clearly identified. Deputy Jones asked Walling for permission to search the vehicles and grounds, to which Walling replied no.

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[2] KRS 218A.1423. Cultivation of five or more marijuana plants, first offense, is a class D felony. KRS 218A.1423(2)(a).

[3] KRS 218A.1432. Manufacture of methamphetamine is a class B felony for the first offense. KRS 218A.1432(2).

The parties disagree concerning what happened after that point. Deputy Jones testified that he informed Walling that he would be seeking a search warrant unless Walling signed a form consenting to the search. Jones further testified that he may have directed Walling to sit on the house steps to await the warrant. Walling testified that Deputy Jones ordered him to sit on the grass in front of his police cruiser, and that it could take up to four hours to obtain the warrant. Walling further testified that Jones threatened to set his police dog on him if he attempted to leave the scene.

After a short time, Walling signed a form consenting to a search of his vehicles and premises. Walling then led Deputy Jones to a shed behind the house, where Deputy Jones found six marijuana plants being grown. Upon seeing the plants, Jones placed Walling under arrest for marijuana cultivation.

During the trip back to the sheriff's office, Deputy Jones received additional information from his dispatcher that there might be more marijuana and a methamphetamine lab on Walling's property. Again, the source of this information was not clearly identified. Deputy Jones and Kentucky State Police Trooper John Marvel informed Walling of his Miranda[4] rights and then asked for permission to search the property again. Deputy

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

Jones and Trooper Marvel testified that Walling gave oral consent, while Walling denies that he agreed to this search. Trooper Marvel went to Walling's property and later found a cooler containing items commonly used in manufacturing methamphetamine.

After hearing the testimony, the trial court found, based upon the totality of the circumstances, that Walling had given a voluntary consent to both searches. After the court denied the motion to suppress, Walling entered a conditional guilty plea pursuant to RCr 8.09 to cultivation of marijuana, five or more plants, and to manufacturing methamphetamine. Pursuant to the Commonwealth's recommendation, the court sentenced Walling to four years' imprisonment, but held the sentence in abeyance pending this appeal.

The provisions of RCr 9.78 govern the procedure for conducting suppression hearings and establish the standard for our review of the trial court's decision on the motion. First, we must determine whether the trial court's findings of fact are supported by substantial evidence. We then review *de novo* its legal conclusions in applying the protections of the Fourth Amendment.[5]

[5] Commonwealth v. Banks, 68 S.W.3d 347 (Ky. 2001), *citing* Ornelas v. United States, 517 U.S. 690, 691, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

The trial court's findings of fact are conclusive if supported by substantial evidence. Furthermore, we must give due deference to the trial court in assessing the credibility of the officers and the reasonableness of their inferences.[6] In its oral and written findings, the trial court observed that where there is conflicting evidence on what occurred, it "is an issue of fact for a jury to decide". But on a motion to suppress pursuant to RCr 9.78, the court sits as the trier of fact.[7] Nevertheless, the trial court's findings implicitly give more credence to the testimony of Deputy Jones and Trooper Marvel than to Walling. The trial court's deference to the officers' testimony was not unreasonable under the circumstances.

A warrantless search is presumed to be unreasonable and unlawful, requiring the Commonwealth to bear the burden of justifying the search and seizure under one of the exceptions to the warrant requirement.[8] Consent is one of those exceptions.[9] Walling admits that he gave written consent to the search, but he argues that his consent was not freely and voluntarily given.

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[6] Ornelas, 517 U.S. at 697-99, 116 S. Ct. at 1662-63.

[7] Brown v. Commonwealth, 564 S.W.2d 24, 30 (Ky.App. 1978).

[8] Cook v. Commonwealth, 826 S.W.2d 329, 331 (Ky. 1992).

[9] Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44, 36 L. Ed. 2d 854 (1973); Farmer v. Commonwealth, 6 S.W.3d 144, 146 (Ky.App. 1999).

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 all the circumstances.[10] In examining the surrounding circumstances to determine if the consent to search was coerced, the court must look to the coercive nature of the tactics used by the police officer, as well as the mental state of the accused in reaction to those tactics.[11] While the trial court generally believed Deputy Jones's testimony, the court gave some credence to Walling's assertion that Jones had been somewhat overbearing in his dealings with Walling after Walling denied consent to search. Furthermore, Belinda Walling had been transported to the hospital, and Walling was required to await the warrant instead of leaving to be with his wife.

Based on the evidence, it appears reasonably clear that Walling was not free to leave after Deputy Jones asked for permission to search the premises. A written consent to search is not involuntary merely because it is executed after the defendant is taken into custody, particularly if the defendant

[10] Schneckloth v. Bustamonte, 412 U.S. at 227, 93 S. Ct. at 2047-48.

[11] Commonwealth v. Erickson, 132 S.W.3d 884, 887-89 (Ky.App. 2004), *citing* Ohio v. Robinette, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996).

was given Miranda warnings prior to executing the form.[12] But in this case, Deputy Jones did not advise Walling of his Miranda rights until after Walling signed the written form.

On the other hand, that fact that Deputy Jones detained Walling while awaiting the warrant does not necessarily render Walling's consent involuntary.[13] Furthermore, Walling's conduct after he executed the written consent does not suggest duress or coercion. Walling led Deputy Jones to the marijuana growing in the shed. After he was arrested, Walling informed Deputy Jones that he wanted to cooperate.

Moreover, the trial court believed Deputy Jones's and Trooper Marvel's testimony that Walling freely gave his oral consent to the second search. At that point, Walling had been advised of his Miranda rights, and there was no evidence that the police had made any threats or promises to Walling to obtain that consent. Finally, even if the second consent is suspect, the results of the first search clearly established probable cause for the later search, and the second search was conducted within a reasonable time after Walling gave his written consent.

We certainly agree with the trial court that it would have been preferable for the police to have obtained a search

[12] Kennedy v. Commonwealth, 544 S.W.2d 219, 221-22 (Ky. 1976).
[13] Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001).

warrant, thus eliminating any need to inquire into the validity of Walling's consent. In addition, the circumstances surrounding that consent were less than ideal. But after considering the totality of the circumstances, we agree with the trial court that Walling's consent to the searches was voluntary and not the product of duress or coercion. Therefore, the trial court did not err by denying Walling's motion to suppress evidence seized as a result of those searches.

Accordingly, the judgment of conviction by the Hancock Circuit Court is affirmed.

ALL CONCUR.

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